TRAINING BULLETIN: FALL, 2002
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COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
44 BROMFIELD STREET, BOSTON, MA 02108

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I. INDIGENT DEFENSE NEWS

LAST CHANCE -- REQUIRED TRAINING FOR ALL CPCS DISTRICT COURT AND JUVENILE DELINQUENCY CERTIFIED ATTORNEYS

In response to the new Sex Offender Registry Statute, CPCS is requiring that all attorneys on the District and/or Juvenile Delinquency Panels attend a one day training concentrating on the legal and procedural issues relating to the Sex Offender Registration and Notification Act. The program has already been offered at several locations throughout the state.

JANUARY 9, 2003 is the **last chance** for District and/or Juvenile Court attorneys who have not yet attended a session to complete this requirement. This training is required in order to maintain certifications in District Court and/or Juvenile Court cases. Attorneys who complete this training will be certified to receive appointments in Sex Offender Registry Board cases which are paid at a rate of $39/hour.

APPELLATE ATTORNEYS – EVER WONDER WHAT YOUR PEERS ARE UP TO?

Join Us For Dinner for The 2nd Appellate Attorney Get-Together

Tuesday, February 11, 2003, 6:30 p.m.
Rock Bottom Brewery
South Shore Plaza (in parking lot, not inside mall)
250 Granite St., Braintree
781-356-2739

A group of panel appellate attorneys gathered for lunch in June to socialize, network, and share work ideas and concerns. Everyone thought it was a great success and agreed that it should be repeated.

We also heard from a number of attorneys that would prefer a get-together that was outside of Boston or after work. So we will be scheduling a **second get-together for dinner on the South Shore, easily accessible to Rte. 128.**

Rock Bottom Brewery is a micro-brewery and restaurant (pastas, burgers, and other items with a sort of southwest flair) entrees range from $10-$15. We will have a semi-private area. The event is being organized by a private attorney on CPCS' post-conviction panel, Bonny Gilbert.

Please RSVP Friday, February 7th, by **sending an e-mail to Bonny Gilbert** at ygilbert@tiac.net.

CPCS JURY SKILLS PROGRAM APRIL, 2003

April 7-11, 2003 from 9:00 a.m. to 5:00 p.m. **each day**, in the Boston CPCS office. This five-day intensive training seminar is open to 24 private and public counsel division attorneys, who will work in small groups coached by experienced trial attorneys. Utilizing mock cases, trainees will improve their skills in opening statements, cross-examination and impeachment, direct examination, and closing argument. Professional actors will perform as witnesses for the cross-examinations. Short lectures will precede the small group exercises and demonstrations by experienced faculty will follow. Evaluations of the previous nine courses have been uniformly enthusiastic. The course is based on the two-week course offered by the National Criminal Defense College in Macon, Georgia, which costs over $1,400. We ask those attending to contribute just $100 to the CPCS Training Trust.

Acceptance into the program will be based on a number of factors, including an effort to obtain geographic and other diversity. To apply for this training opportunity, send your statement of interest to Training Director, CPCS Training Unit, 44 Bromfield Street, Boston, MA 02108 or e-mail to kmunichiello@publiccounsel.net State how long you have practiced criminal law; describe the number and types of jury trials you have undertaken, including the nature of the charges and whether the trials were in Superior or District Court; list the bar advocate programs to which you belong and whether you are a member of any other CPCS

certification list (e.g., juvenile, mental health, CAFL); and provide any other information you consider pertinent. Applications must be received by March 1, 2003. **Participants are expected to attend the entire program. Keep your calendars clear.**

CPCS ANNUAL TRAINING CONFERENCE

The 2003 CPCS Annual Training Conference will be held on Friday, May 9, 2003, from approximately 8:30 a.m. to 5:00 p.m. at the Worcester Centrum Centre in downtown Worcester. Criminal Law, Children and Family Law, Appellate and Mental Health programs will be offered.

The cost for the conference is a $95.00 contribution to the Training Trust. This entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. **Enrollment is limited and available slots will be filled on a first-registered, first-served basis.** The conference is only open to attorneys who accept assignments through CPCS. Please use the registration form posted at CPCS's web site, http://www.state.ma.us/cpcs/training.

CPCS ACCEPTS NOMINATIONS FOR AWARDS

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for

the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

Nominations: Nominations for these awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108. The deadline will be sometime in early March. We will keep you updated. The Committee will present the awards at the CPCS Training Conference on Friday, May 9, 2003.

II. CHIEF COUNSEL'S MESSAGE

Just three months from now, on March 18, 2003, large segments of the legal community will celebrate the fortieth anniversary of the landmark right to counsel decision in Gideon v. Wainwright, 372 U.S. 335 (1963). The decision is famous for its rare Supreme Court unanimity in overruling the controlling precedent of Betts v. Brady, and its evident pride in the fairness of our justice system ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"). The decision soon became etched in American history by publication of Anthony Lewis' best-selling Gideon's Trumpet, and by the perennially popular movie of the same title, starring Henry Fonda as Clarence Earl Gideon. Amid all the acclamation and self-congratulation, few people paid heed to Lewis' warning that fulfillment of the Gideon promise would hardly be self-executing:

> It will be an enormous social task to bring to life the dream of [Gideon] – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.

Likewise, few people then or now were aware of the critical role which Massachusetts lawyers – specifically, Massachusetts prosecutors – played in the development of this historic decision. Here's what happened: the Florida Attorney General sent a routine letter to his counterparts in other states requesting amicus assistance. Walter Mondale, then the Minnesota AG, disagreed vigorously with Florida's position, and told them so. He then sent a copy of his correspondence to several other Attorneys General, including Edward J. McCormack, Jr. of Massachusetts, who passed it along to the chief of his Division of Civil Rights and Civil Liberties, Gerald A. Berlin. It was Attorney Berlin who decided to write in support of Mr. Gideon and the right to counsel. This he proceeded to do and, aided by the lobbying assistance of AGs McCormack and Mondale, accomplished the following spectacular result:

> The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.
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> The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.
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> (372 U.S. at 345)

Finally, not everyone is aware that at the time of the Gideon decision, Massachusetts had not only, by decisions of the Supreme Judicial Court, required the assignment of counsel for poor people in felony cases, but had, by legislative passage and gubernatorial enactment, already established a statewide public defender agency, the Massachusetts Defenders Committee, in 1960. Thus, by the time that Gideon became the law of the land, Massachusetts had already far surpassed the minimal compliance required by the Constitution. Massachusetts stood, at that time, as a standard-setter in the provision of counsel to indigent persons charged with crime, and an enlightened model for states less protective of individual liberty.

How dramatically and how sadly the times have changed since 1963. It is true that Massachusetts has become and today remains a national leader in the rigor of its certification and training and performance standards. But this Commonwealth, which once set the constitutional standard for the nation, even to the point of intervening on behalf of unprotected criminal defendants in seemingly less enlightened jurisdictions, has fallen precipitously compared with other states in the hourly rates it pays to counsel for the poor. In a counsel system which is heavily weighted toward private counsel assignments, CPCS-certified counsel are compensated at hourly rates which are among the lowest in the country, and which are inadequate to maintain even a modest law office. It is therefore unsurprising that more and more attorneys have become unavailable for court assignments, or have removed themselves from CPCS certification lists entirely. The result is an escalating constitutional crisis, in which the right of the poor to be represented by counsel is being undermined by the Commonwealth's unwillingness to pay for legal representation which the Constitution and the laws of the Commonwealth require.

At its meeting on December 11, 2002, the Committee for Public Counsel Services, after considering the evidence taken at the recent public hearings on private counsel compensation, and the hourly rates which prevail in Federal Court and all other state systems, voted unanimously to authorize hourly rates of $120 for murder cases; $90 for Care and Protection, Superior Court Criminal, Youthful Offender, Sexually Dangerous Person and Sex Offender Registry cases; and $60 for all other cases, including District court criminal cases, which alone account for approximately 60% of CPCS assigned counsel cases. (It bears emphasis that these authorized rates cannot, by statute, become effective in the absence of an appropriation, passed by the Legislature and signed by the Governor). The new authorized rates are higher than the $50/$65/$85 levels which the Committee authorized in May, 1994; and they are far higher than the $30/$39/$54 limits imposed annually since fiscal year 1997 by the Legislature.

By any comparative measure, Massachusetts now lags far behind other states in its funding of the right to competent counsel for poor people. When assigned counsel in the Federal District Courts of Boston or Worcester or Springfield are paid at the rate of $90 per hour, while their CPCS counterpart down the street is paid $39 per hour to defend against life felonies, can anyone doubt that the state counsel system is fast approaching crisis? When lawyers are paid $30 per hour to represent children in CHINS and delinquency cases, is anyone surprised that cases are being continued solely due to the lack of a sufficient number of attorneys who can represent people in need at this compensation level?

This Commonwealth pays hundreds of dollars per hour for the legal representation of highly placed officials who come under investigation for alleged wrongdoing. Attorneys at private law firms may charge five to ten or more times the CPCS hourly rate when providing advice or legal counsel in matters of business or commerce. Yet when the liberty or family interests of poor children and adults are at stake, the great principles of equality and fair treatment which inspired the Gideon decision appear to be forgotten.

It is ironic and tragic that Massachusetts, which once breathed life into the Sixth Amendment right to counsel for poor people, is now suffocating that right. This lack of support must be corrected. The time to correct it is now.

III. CASENOTES

The following casenotes summarize appellate decisions released in May, June, and July, 2002. Always Shepardize, to check for later-breaking decisions on applications for, or decisions after, further appellate review.

ADMISSIONS AND CONFESSIONS: ARRAIGNMENT DELAY

The defendant was arrested at 12:30 a.m. His interrogation did not begin until approximately 7:30 a.m., at the police station. He had been given Miranda warnings three times, and signed a waiver of those rights following the last warning, just before the questioning began. The six-hour "bright line" exclusionary rule announced for only prospective application in Commonwealth v. Rosario, 422 Mass. 48 (1996), did not apply, said the Appeals Court, and the delay here had largely been because there were too few Spanish-speaking police officers on duty at the relevant time, and too many suspects and witnesses needing the aid of those Spanish speakers who were available. The defendant had been permitted a lengthy telephone call with his mother, sat in a police file room rather than being confined to a cell, had fallen asleep from time to time during the night, and appeared alert, coherent and calm. *Commonwealth* v. *Montanez*, 55 Mass. App. Ct. 132, 143-144 (2002).

ADMISSIONS AND CONFESSIONS: MIRANDA; 'BOOKING QUESTIONS' EXCEPTION

The defendant had been the driver when a drug seller delivered cocaine to an undercover police officer inside an apartment building twice. When he was arrested while waiting in the building lobby on the second occasion, he was immediately asked his name, and responded, falsely, "George Lassu." The officer responded that he knew this was a lie; later, he testified that he recognized the defendant from a previous encounter and recalled that the defendant had given a false name then, but could not remember the defendant's true name when he had asked the question at the time of this arrest. *Commonwealth* v. *Ramirez*, 55 Mass. App. Ct. 224, 226 (2002). The Commonwealth, obviously, would find the false name useful to suggest a consciousness of guilt. The defendant moved to suppress on the ground that he had not been given Miranda warnings before he was asked his name.

Though the question was not asked in the "booking" milieu, the Appeals Court held that the request for a name "falls with a routine booking question exception which exempts from Miranda's coverage questions to secure the biographical data necessary to complete booking or pretrial services." The defendant suggested that the officer instead was seeking or expecting an incriminating response, i.e., a *false* name, because the defendant had given a false name previously: the "routine booking question exception" doesn't apply to questions designed to elicit an inculpatory response. But "[a] defendant's false response to a routine request for his name on one occasion does not immunize him from similar requests on future occasions." *Id.* at 226-227.

ADMISSIONS AND CONFESSIONS: MIRANDA; "CUSTODY," INVOCATION OF RIGHT TO COUNSEL

The defendant was immediately the prime suspect in the murder of a woman who was last seen alive in his company and whose nude body was found less than twenty-four hours later in the woods adjacent to a rest stop. He was not charged with the murder until about ten years later, after police obtained from him a confession, the circumstances of which were, obviously, an issue on appeal. *Commonwealth* v. *Girouard*, 436 Mass. 657 (2002).

Nine years and ten months or so after the murder, the defendant was taken into custody for a parole violation on charges unrelated to the murder. He had threatened suicide prior to his incarceration. Two state troopers obtained the defendant's "agreement" to provide a blood sample, and testing thereafter revealed that he could not be excluded as the donor of sperm obtained in a vaginal swab of the murder victim. A state trooper and a city detective then met with the defendant where he was imprisoned at MCI-Concord; after pleasantries about things "going good" at home, the trooper read Miranda warnings to the defendant. According to the trooper, the defendant said he understood the rights, signed the card, and agreed to speak with the officers. Questioned first about his recent suicide attempt, he said that he had not been serious, but had feigned the attempt to counteract his wife's action toward a divorce. He then first stuck to his long-ago statement about the unsolved murder, but, when confronted with the officer's accusation that his sperm was found inside the victim, acknowledged having had sexual intercourse before dropping her off at a bar. Persistent questioning yielded a change in story to having dropped her off at the rest stop, and then, eventually, a tearful confession to having killed her.

At some "later" point in the interview, inferentially AFTER the tearful confession, the defendant asked if he were under arrest and was told that he was not. He replied that if he was under arrest, he wanted an attorney. When the officers then told him that if he wanted them to leave, they would do so, he again asked if he were under arrest and was again told "no." He then said that he would talk to them if he was not under arrest, and "provide[d] a statement" transcribed by one of the officers. While it would seem that the oral confession was pretty clearly admissible upon a factual finding, which the judge made, that Miranda warnings were given and waived from the get-go, the appellate decision apparently focused instead on what came later, i.e., the written confession. This entailed discussion of whether the defendant was "in custody" (with an assertion in that through-the-looking glass way that he was NOT in custody ["the mere fact that a person is incarcerated does not automatically render that person 'in custody' for Miranda purposes," *id.* at 665]) and whether his comments amounted to a request for counsel (no, because the request was "qualified on a circumstance that had not occurred, namely, his arrest," *id.* at 666).

ADMISSIONS AND CONFESSIONS: MIRANDA; RENEWED INTERROGATION AFTER INVOCATION OF RIGHT TO COUNSEL

The defendant's wife called police to the scene with a report that the defendant had a knife and was threatening to kill her. She was bleeding on the floor, barely alive when they arrived, and the defendant was nearby, holding a gun to his head. He was arrested, cuffed, and put in the back seat of a cruiser, and given Miranda warnings by a later-arriving officer. He indicated understanding, said he wanted to talk, and described an argument culminating in his stabbing his wife in the shoulder. After he asked about his wife's condition and was told that medical personnel were still working on her, he said that he did not think he should say anything else without talking to an attorney. This was an invocation of his right to counsel.

About twenty minutes later, at the police station, he was again read Miranda warnings.

He told the officer he understood, but did not want to talk about the stabbing, and declined to sign the waiver sheet. He did ask how he should go about getting a lawyer, and said that he was requesting a lawyer, but asked if he could change his mind later. He was told that he could change his mind, but that if he requested an attorney, "we're all done talking." During booking, the defendant telephoned his sister and told her he had stabbed his wife and needed an attorney. After booking, the defendant was taken only briefly to a cell, but was brought back to the booking room for an hour, out of concern that the cell's running water might be used to wash off any blood on his clothing. An officer was assigned to sit with him, but purportedly initiated no conversations; the officer responded to the defendant's questions about his wife's condition with the answer that he did not know. Twice, the defendant asked if he needed an attorney and was told that he would have to decide that for himself. When the defendant asked whether he was in a lot of trouble, the officer said yes. The defendant was returned to his cell, where he remained for about an hour and a half.

Purportedly because state police now arrived to run the show, and were told by the local "babysitting-in-the-booking-room" officer that that officer didn't know whether or not the defendant had requested an attorney, the state police had the defendant brought to an interview room. **The local officer in charge, however, testified that he had told the state police that the defendant HAD invoked his right to counsel, and the motion judge credited this testimony**. The motion judge did so notwithstanding the state police senior officer's claim that he was given no such information and instead "understood that the defendant was 'talking to' police." *Commonwealth* v. *LeClair*, 55 Mass. App. Ct. 238, 241 n. 5 (2002). The motion judge's finding of fact supported his subsequent ruling suppressing statements made by the defendant during this state police - initiated interrogation. That the Appeals Court simply ignored the import of the motion judge's finding does not speak well of it. (Cf., e.g., Commonwealth v. Grandison, 433 Mass. 135, 137 [2001] [judge's denial of motion to suppress implies resolution of factual issues in favor of Commonwealth].) The announced rationale for the Appeals Court's contrary result was that the defendant's repeated inquiry (to the "baby-sitting" local officer) as to whether he needed counsel "evinced a desire for more generalized conversation at least sufficient to permit further inquiry about whether the defendant continued to stand by his earlier invocation of his right to counsel." *Id.* at 245. When the state police brought the defendant in again and read "the entire Miranda warning anew," the defendant's "free and voluntary" waiver of silence and counsel then produced an admissible statement, according to the Appeals Court.

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ADMISSIONS AND CONFESSIONS: MIRANDA, VOLUNTEERED STATEMENTS AT BOOKING

A police officer was shot at while pursuing the defendant after he saw them trying to break into a car. While being booked, the defendant recognized the officer from the neighborhood in which they both lived, and said that he hadn't known it was him, and "Let's squash this." The officer retorted, "you're crazy. How can we squash this? You guys just shot at me." The defendant became angry and responded, "I know where you live. You drive a B[eamer]. We're going to take care of you. I'm going to get you." The judge hearing the defendant's motion to suppress these statements was held to have correctly ruled that these statements were spontaneous or 'volunteered.' The officer's "question" ('how can we squash this?') was said to be rhetorical, and not an "interrogation." *Commonwealth* v. *Gittens*, 55 Mass. App. Ct. 148, 149-150 (2002).

APPELLATE PRACTICE: G.L. c. 278, §33E; CRIMINAL RESPONSIBILITY QUESTION ESCHEWED

The defendant was convicted of a particularly gruesome first degree murder, the jury finding both deliberate premeditation and extreme atrocity or cruelty. An expert witness testifying for the defense opined that she suffered from chronic dissociative disorder, a fractured view of reality, substance abuse, and antisocial personality disorder, and had auditory and visual hallucinations. Further, he testified, she "often made up stories and took blame for things for which she was not responsible as a form of escapism and empowerment — i.e., the defendant proved she existed through the reaction of others." *Commonwealth* v. *Fernandes*, 436 Mass. 671, 673 (2002). A psychiatrist called by the Commonwealth in rebuttal opined that the defendant had an antisocial personality disorder and substance abuse disorder, but asserted that there was no evidence of delusions, hallucinations, or other psychosis, and that she was criminally responsible for her actions.

Appellate defense counsel asked the SJC to direct the entry of a verdict of not guilty by reason of insanity, or reduce the verdict to manslaughter, or order a new trial pursuant to its power under G.L. c.278, §33E, but the Court was aware of NO case in which it had ever ordered the entry of a judgment of not guilty by reason of insanity after a jury had rejected such a defense. It was clear that this was not going to be the first one. Although there have been instances of the Court ordering a new trial when troubled by the issue of criminal responsibility in first degree homicide prosecutions, this case suffered from the defendant's full confession, which perfectly recalled a chillingly sadistic torture and murder, anticipated verbally by the defendant for days preceding it and followed by extensive steps taken toward creating an alibi. "[T]he issue of the defendant's criminal responsibility was fairly tested by zealous advocacy by both the prosecutor and defense counsel." *Id.* at 676.

ADMISSIONS AND CONFESSIONS: STATUTORY RIGHT TO USE TELEPHONE AT STATION

In *Commonwealth v. Alicea,* 55 Mass App. Ct. 505 (2002) the Appeals Court was faced with a trial court's finding that the police had intentionally violated the defendant's right to use the telephone within one hour of being taken into custody at the police station. This right is statutory, not constitutionally-based. G.L. c. 276, s. 33A requires the police to "forthwith" inform all persons taken into custody of their right under the statute to use the telephone within an hour. In this case the police did not allow the defendant to use the phone for over seven hours. During that seven-hour period the police had promised leniency to the defendant if he cooperated, and had lied to the defendant's wife about the state of the evidence to enlist her help in persuading the defendant to give a statement implicating himself. The Commonwealth did not waste any energy in trying to save the initial statement of the defendant given in the wake of this fairly egregious violation. The real issue was a statement given by the defendant after he was advised of his right to use the telephone and had actually made a phone call. The motion judge had suppressed this later statement as the fruit of the poisonous tree. In such a case, suppression is not automatic. If the Commonwealth can prove that the connection between the police misconduct and the statement made after the defendant was given his right to use the telephone was so attenuated as to dissipate the taint of the misconduct, the statement can come in. In this case, the later statement was solicited by the same officers who had conspired to keep the defendant in isolation in the first place. Further, they requested the statement to "verify" certain details contained in the

tainted statement. Given this context, the Court concluded that the later statement was derived directly from the first and thus excludable as the fruit of the poisonous tree.

COUNSEL, INEFFECTIVE ASSISTANCE: FAILURE TO PURSUE 'LACK OF CRIMINAL RESPONSIBILITY' DEFENSE DUE TO PRESCRIBED MEDICATIONS' INTERACTION WITH ALCOHOL

See ***DEFENSES: INTOXICATION WAS INVOLUNTARY (UNANTICIPATED EFFECT OF PRESCRIPTION DRUGS WHEN ACCOMPANIED BY TWO ALCOHOLIC DRINKS)***, summarizing *Commonwealth* v. *Darch*, 54 Mass. App. Ct. 713 (2002).

COUNSEL, STAND-BY: REFUSAL TO ORDER RESUMPTION OF REPRESENTATION

On the first day of his first degree murder trial, the defendant moved, in writing and with accompanying affidavit, to dismiss his two attorneys and to be allowed to proceed pro se. After a colloquy, the motion was allowed. Counsel was asked, and agreed, to serve in a stand-by capacity. The defendant's wishes changed by the fourth day, when he moved for a mistrial, "citing his lack of legal expertise, his misunderstanding regarding the role of stand-by counsel, and what he perceived to be a negative reaction to his defense by the jury in the court room and the media in their reporting." The judge refused to declare a mistrial, but asked if the defendant wanted stand-by counsel to resume representation. The defendant did want this, but stand-by counsel "declined to accept that role," and the judge "stated that he had no authority to order counsel to resume representation." *Commonwealth* v. *Kenney*, 437 Mass. 141, 149 (2002). Stand-by counsel did agree to assume a more active "hybrid" sort of role, e.g., participating in sidebar conferences, voicing objections, and assisting the defendant in preparing his cross-examination. On appeal of the ensuing convictions, the defendant argued that the judge erred in refusing to order counsel to resume representation.

The Court stated that the judge was not required to order unwilling counsel to resume representation: "[a] judge may consider the burdens on counsel." *Id.* at 150. "Having chosen to proceed pro se, the defendant waived his right to counsel." *Id.*

COURTROOM, CLOSURE OF: JURY IMPANELMENT, INDIVIDUAL VOIR DIRE, PRIVACY CONCERNS; IMPOUNDMENT OF TRANSCRIPT PORTIONS (NAMES OF SOME POTENTIAL JURORS)

Prior to trial of a very widely publicized murder of a ten-year-old boy, preceded by his kidnapping and sexual assault, the judge announced to counsel that she would inform the venire as a whole that she would be asking them individually questions "about prior sexual abuse, their attitudes about ... homosexual people, and their ... prejudices regarding people of different races. And if anyone has a privacy issue regarding that concern, to inform the Court so that the courtroom can be closed during such questioning." No objection was made at this point or when the judge announced the procedure to the venire; the judge told the venire that if she found their voiced "privacy issues" to be "legitimate," she would continue individual questioning on such private issues in a closed courtroom, but not otherwise. Sixteen potential jurors requested privacy.

On appeal of his conviction of second degree murder, the defendant argued that closure of the courtroom during parts of the voir dire violated his constitutional right to a public trial.

For purposes of its decision, the Court assumed, but did not decide or hold, that the defendant had standing to challenge the closure of the courtroom. On the merits, the Court held that while there is a strong "presumption of openness" in court proceedings, the presumption may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Commonwealth* v. *Jaynes*, 55 Mass. App. Ct. 301, 312 (2002), quoting from Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 510 (1984). The Appeals Court held that "the interests of individual members of the venire in maintaining their privacy while providing the court and the parties extremely sensitive information about their beliefs and life experiences was an overriding one." 55 Mass. App. Ct. at 312.

In a related vein, the defendant argued on appeal that it was error for the judge to promise (and thereafter for a single justice to accomplish this promise by an impoundment order) that the potential jurors' names would be removed from the transcript of proceedings if she found their privacy issues legitimate. *Id.* at 313. The standard of review of impoundment orders was said to be "abuse of discretion." Given the Court's stated beliefs, (1) "that the privacy concerns of the potential jurors in the instant case could hardly be more compelling," and (2) that "the presence or absence of the particular names in the transcript seems to be at most of only tangential relevance to the purposes of a public trial," *id.* at 314, there was no chance that such an abuse would be found.

CRIMES: ACCESSORY AFTER THE FACT OF A FELONY (G.L. c.274, §4); NUMBER OF POSSIBLE CONVICTIONS = NUMBER OF FELONIES COMMITTED BY PRINCIPAL

See ***DOUBLE JEOPARDY: UNIT OF PROSECUTION FOR "ACCESSORY AFTER THE FACT"***, summarizing *Commonwealth* v. *Perez*, 437 Mass. 186 (2002).

CRIMES: AGGRAVATED RAPE; REQUISITE AGGRAVATING ACT MUST "FACILITATE" THE RAPE

A man she just met in a bar surreptitiously followed the victim as she became lost driving home. When she became stuck in snow, he materialized and offered assistance. Soon enough, however, he forced her into the back seat of her car and raped her vaginally, using "no greater force than was necessary to complete the crime." After the rape, both got out of the car. The defendant began to insult the victim, and then told her that she couldn't expect him to let her leave now, since she had "all the evidence on [him]." He hit her on the back of the head, knocking her to the ground. When she asked why he had done this, he began choking her, telling her that he had just gotten out of jail and could not let her live because he did not intend to go back to jail. After she broke his grip, he again regained it and choked her, but she struggled free and began to walk away. A statement she made apparently enraged him, causing him to throw her to the ground and kick her in the face. Thereafter, when she attempted to smoke a cigarette, he again kicked her in the face, and subsequently threw her to the ground again, punching her in the back. *Commonwealth* v. *McCourt, 54* Mass. App. Ct. 673, *675-676* (2002).

The defendant's motion for required finding of not guilty as to so much of the indictment as charged "aggravated" rape should have been allowed, because the bodily injuries were inflicted after the rape and did not facilitate it in any way. In so holding, the Appeals Court rejected the premise that circumstances could provide "aggravation" simply by occurring during "one continuous episode and course of conduct." The relevant statute, G. L. c. *265,* §22(a),

defines aggravated rape as sexual intercourse "result[ing] in" or "committed with" acts resulting in serious bodily injury. The Commonwealth had argued that this episode was within the latter category, since sexual intercourse "was part [albeit only the initial, and to the Court, segregable, part] of a continuous episode that produced serious bodily injuries [.]" *Id.* at 678 n. 7. The Appeals Court ordered that the defendant be re-sentenced on the lesser included offense of rape. *Id.* at 681-682.

CRIMES: ASSAULT AND BATTERY BY MEANS OF DANGEROUS WEAPON; CHEMICAL MACE AS DANGEROUS WEAPON (PER SE)

In the early morning, "Linda" called her friend "Cathy," and made arrangements to go to Cathy's home to visit. Linda was to walk toward Cathy's home, and Cathy was to walk toward Linda's, so that they would meet half-way and Linda would be accompanied during the remainder of the journey. Before Linda met up with Cathy, a man grabbed her and carried her into a parking garage, where he banged her head against cement, punched her in the face when she screamed, ripped off her underwear, attempted to perform oral sex on her, and vaginally raped her. To improve her chances of escaping, she told him that they could go back to her home. He agreed, but threatened that if anyone was at that site, he would kill them or Linda. Cathy saw the man holding Linda by the neck as they walked, and Cathy set upon him with a spray can of mace. The man released Linda but set upon Cathy, turning the spraying can toward her face before picking her up and throwing her against the parking garage wall. He also hit and kicked her, and grabbed at her crotch area while continuing to hit her with his other hand as she screamed. Police came along. The defendant was stopped nearby, smelling intensely of mace, and was identified as the attacker. *Commonwealth* v. *Lord*, 55 Mass. App. Ct. 265 (2002).

The Appeals Court addressed the defendant's contention that chemical mace was not, per se, a dangerous weapon within the meaning of G.L. c. 265, §15A(b). A weapon is regarded as dangerous per se when it is "designed and constructed to produce death or great bodily harm," or "serious injury," or bodily harm that "endangers another's safety." These definitions obviously have a changeable and expanding effect. The Court found the requisite degree of bodily harm - capability, on the basis of the testimony of a state trooper as expert: this "mace" was the "old style" tear gas, not just "pepper spray," and it would cause a burning sensation on one's face, with a lot of tearing, drooling from nose and mouth, affecting breathing and causing a "tight sensation" in one's lungs and "a hard time breathing," all said to be "part of the disabling effects of the spray," which last as little as forty minutes or as long as a couple of days, the degree of debilitation depending upon the individual's sensitivity and tolerance for pain. The opinion held that the issue of whether or not this victim actually suffered serious bodily injury was irrelevant to the "required finding" discussion. *Id.* at 271.

As to another issue, the Court found no unconstitutional "duplicity" in three separate convictions and consecutive sentences for crimes involving Cathy as victim. There was an initial assault & battery with the mace, and then assault and battery by throwing her into a concrete wall and battering her with hands and feet, and then an indecent assault and battery (grabbing at her crotch in an apparent attempt to remove her underwear). *Id.* at 272.

CRIMES: ASSAULT AND BATTERY; SPITTING

In *Commonwealth v. Cohen*, 55 Mass. App. Ct. 358 (2002), the issue on appeal was whether intentionally spitting on someone constitutes a prohibited touching. Amazingly, this was a case of first impression in Massachusetts, and apparently gave the defendant cause for optimism.

Such optimism was unwarranted. "The absence of such a [prior reported] decision speaks to the self-evident nature of the conclusion." Id. at 359. The Court went on in some detail about how repulsive it is and then adopted the holdings of other jurisdictions: an intentional spitting on another constitutes a criminal battery.

CRIMES: CHILD PORNOGRAPHY, POSSESSION OF; COMPUTER HARD DRIVE STORAGE

The defendant was convicted on seven indictments charging possession of child pornography, G.L. c. 272, §29C, a statute prohibiting possession of such pornography "in various forms of media, including 'depiction by computer.'" On appeal, the defendant argued that "depiction" does not include an unopened file on a hard drive, but only a file that is reduced to a hard copy, or one that is disseminated. *Commonwealth* v. *Hinds*, 437 Mass. 54, 63 (2002). The Court rejected the argument that the statutory language, in context, signified that only "physically tangible items" or at least "visual reproductions" were proscribed. "[T]he legislature's creation of a separate and distinct category for 'depiction by computer' manifests an intent to give special treatment to the unique issues presented by computers, including the fact that stored data, although intangible in their unprocessed form, are readily transferrable to a graphic image." *Id.* at 63-64. Because the defendant was charged only under the "possession" portion of the statute, it didn't matter that he was not shown to have disseminated the images. *Id.* at 64.

CRIMES: CONSPIRACY; ELEMENT OF 'AGREEMENT' REQUIRES MORE PROOF THAN PARTICIPATION IN COMMISSION OF SUBSTANTIVE OFFENSE

The Commonwealth's evidence was that the defendant was with three friends in a car when one of them, Greg (after all had been patronizing various bars "throughout the night"), cried out, "Let's get back at Doug!" "Doug" was the owner of a motorcycle shop with whom the speaker had had a dispute two or three months earlier. The driver stopped, Greg got out, the driver drove away, about a hundred yards up the road, but then stopped. The driver and the defendant got out of the vehicle and walked back to the shop; the other friend had passed out from alcohol consumption. The defendant and the driver saw that the windows of the building had been smashed with rocks. While trying to convince Greg to leave, the driver and the defendant threw rocks at the shop. All fled when the police arrived.

Though the defendant was found guilty of both malicious destruction of property and conspiring to destroy property, the Appeals Court ordered a required finding of not guilty on the latter charge. *Commonwealth* v. *Costa*, 55 Mass. App. Ct. 901 (2002). Rejecting the Commonwealth's request to hold that the existence of "agreement" could be inferred from the evidence of the defendant's participation in the underlying offense, the Court found that the circumstances here "evince[d] spontaneity rather than planning and pursuit of a prearranged systematic course of action." *Id.* at 902. That the defendant and driver walked back to the site after driving up the road was an insufficient basis on which to found the conspiracy charge; it merely "fit the classic paradigm of an accomplice adding encouragement to a crime in progress." *Id.* (citation omitted).

CRIMES: CONTROLLED SUBSTANCES, DISTRIBUTIVE INTENT; NEW TRIAL ORDERED UPON A COMBINATION OF ERRORS

See *Commonwealth* v. *Marchese*, 54 Mass. App. Ct. 916 (2002), summarized at ***POST-***

CONVICTION PRACTICE: RULE 25(b)(2) ORDER OF NEW TRIAL BY TRIAL JUDGE...

CRIMES: CONTROLLED SUBSTANCES; "POSSESSION" NOT ESTABLISHED

The defendant was in the kitchen of the third floor apartment of a three-decker building, speaking on the telephone, when police intruded to execute a search warrant. Nine hundred and fifty-one dollars in cash was found on his person. In one of the three bedrooms, police saw razor blades, a scale, paperwork indicating drug sales, male clothing a cup with the defendant's picture on it, male clothing, a key to the apartment, a heart-shaped wreath with the inscription "I [picture of a hear] you Roy," and paperwork affiliated with both "Henry James" and "Roy Weston," including an invoice listing the apartment's address as that of Weston. The defendant, Henry James, was also known as Roy Weston. In each of the other two bedrooms was evidence suggesting their use as sites for smoking crack (rock) cocaine (smoldering crack pipe, razor blades, pieces of crack cocaine, cut-cornered baggies). The living room and kitchen "were sparsely appointed," but paperwork and equipment associated with the sale of crack cocaine were found in the pantry. A two-ounce bottle of inositol, along with a plastic margarine container bearing "off-white residue," was found in the bathroom; inositol was said to be used as a cutting agent to dilute cocaine. *Commonwealth* v. *James*, 54 Mass. App. Ct. 726, further appellate review ALLOWED, 437 Mass. 1106 (2002).

Police also found, in the attic of the three-decker, a sifter, razor blades, four bottles of rubbing alcohol, and 102.17 grams of powder cocaine in a bag within a plastic bag. Fingerprints were found on the alcohol bottles, but did not match those of the defendant or of the other six persons detained in the apartment. The trafficking indictment on which the defendant was convicted was premised upon his alleged possession of the powder cocaine in the attic. The Appeals Court reversed his conviction and ordered a required finding of not guilty, based upon its conclusion that the evidence did not establish such possession.

The sole point of entry to the attic was via a "shed" on the third-floor back porch of the three-level, three-apartment building. Each level had a back porch, and each porch had a shed, and these were said to be "a common structural feature of a three decker in the city of Worcester." The sheds were accessible only from the porches, not directly from the apartments. The back porches were connected by a common stairway all the way to the ground level, and no gates or doors impeded access. The third-floor porch shed had been secured by a combination lock which police pried off during their search. Inside the ceiling of this shed was a "kind of entrance square," a "cutout", which was the sole means of access to the attic. *Anyone* would have to use it to get into the attic, e.g., "to do repair work." There was no ladder inside the shed, so police access into the "cutout" meant climbing the side of the wall, stepping between boards, upward some eight and a half to ten feet. Police found no personal items, paperwork, or anything else connected to the defendant or any of the other detained persons. There was no evidence from the building owner regarding access to the attic by the defendant or others, and no evidence suggesting the defendant behaved suspiciously or showed consciousness of guilt about the attic. Likewise missing was any "demonstrable showing that the crack cocaine found in the apartment was derivative of the powder cocaine found in the attic."

CRIMES: CONTROLLED SUBSTANCES, "SCHOOL ZONE" VIOLATION

A school "site" in Winchester is comprised of "some twenty-four acres, consisting of an approximately eighteen acre portion containing the school building, a playground, and a soccer field, and the remaining contiguous approximately six acre undeveloped portion consisting

entirely of wetland, woodland, and a steep cliff." The defendant sold drugs at his home, and argued that this site was not within one thousand feet of the part of the *property which was used or usable for school purposes*. The fact that the portion of the school property which was within one thousand feet of the defendant's home was undeveloped and unused did not negate the defendant's criminal liability under G.L. c. 94C, §32J: if the activity occurred within one thousand feet of the school property's "boundary line," §32J was violated. *Commonwealth* v. *Paige*, 54 Mass. App. Ct. 840 (2002).

CRIMES: DISSEMINATION OF MATTER HARMFUL TO MINOR; DEFINITION OF 'MATTER'

In *Commonwealth v. Washburn,* 55 Mass. App. Ct. 493 (2002) the defendant challenged his conviction for disseminating matter harmful to a minor. Is a computer image 'matter'? The defendant was a math teacher at Rockland High School who allegedly showed a student, on a computer screen in his classroom a picture of a naked woman. He then tried to fondle the student, who resisted and left the building. The boy told his parents what had happened as soon as he got home: the police were notified, the teacher was arrested, and the computer was searched. Pornographic images were found on the computer's hard drive. The Court made short work of this one. "Matter" as defined by the governing statute includes 'visual representations' and 'pictures.' The computer images in this case fit "comfortably" within either definition.

CRIMES: FORGERY, UTTERING, LARCENY OVER $250; FAILURE OF PROOF OF INTENT TO DEFRAUD WHEN SIGNING CHECKS

The defendant was accused of taking five checks upon his father's bank accounts, of making them out payable to himself, of signing the checks, and of presenting them for payment and obtaining money. These allegations were the basis of five counts each of larceny over $250, uttering, and forgery, and the defendant was convicted of all charges. The defendant's father, though subpoenaed by the Commonwealth, did not testify at trial. Officials from the banks described customary practices when a customer complains that a check is not properly payable: the customer is required to report the matter to the police, the police notify the bank, the bank thereafter requires the customer to sign an affidavit certifying that the customer did not sign the checks at issue, the bank reimburses the customer, and the bank suffers the loss of money. *Commonwealth* v. *O'Connell*, 55 Mass. App. Ct. 100, further appellate review **allowed**, 437 Mass. 1106 (2002).

Because the father failed to testify, the defendant argued that the Commonwealth failed to prove a lack of authorization in connection with each check. It is not a criminal act to sign a check on behalf of someone else if authorized to do so, for instance, when "an adult child of a competent but physically disabled elder parent, say with a broken hand, signs the parent's name, with the parent's permission, as maker of a check." *Id.* at 104. Though the Appeals Court agreed in principle that an absence of authority, evidencing an intent to defraud, "may be proved by circumstantial evidence," *id.* at 105, it rejected the Commonwealth's argument that the fact that the bank reimbursed the father here was sufficient to prove, beyond a reasonable doubt, that the father did not authorize his son to sign the parent's name. "The bank's customary practices and actions following investigation of [the father's] complaints may well have been dictated by purposes (such as customer retention) that are foreign to the criminal law and, in any event, are essentially only the bank's opinions as to what had occurred. These opinions, in turn, had as part of their basis the inadmissible hearsay statements made by the father to bank employees." *Id.* at

106. ***Practice tip.*** Defense counsel here made appropriate objections to testimony of bank personnel that the father had made complaint to the banks as to the checks, and the testimony was then admitted, still over objection, "only to explain why the bank officials acted as they did thereafter and not to prove that the checks were in fact properly payable." *Id.* at 102 n. 4. The Appeals Court explicitly questioned the admissibility of testimony as to the bank's "customary practices," inasmuch as "the bank's implementation of its customary business practice in any particular situation requires it to rely upon certain explicit representations by [some] particular customer," i.e., the father in this case. These representations were themselves "inadmissible at trial." "[E]vidence ... of the actions taken by the bank following the father's complaint and signature of a document implicate hearsay because of necessity they lead by direct inference to statements made by the father." *Id.* at 106-107 n. 12.

CRIMES: FRAUDULENTLY OBTAINING CABLE TELEVISION SERVICES (G.L. c. 166, §42A); CIRCUMSTANTIAL EVIDENCE OF PROPER LICENSURE OF COMPANY HELD SUFFICIENT; JURY INSTRUCTION REQUIRED ON THIS ESSENTIAL ELEMENT

The defendant argued on appeal that he was entitled to a required finding of not guilty at his trial for fraudulently obtaining cable television services, because under the applicable statutory definitions, the "victim" of such fraud had to be a "telecommunication service" licensed under the provisions of G.L. c. 166A, and the prosecution had failed to offer proof of such license. While there was no direct evidence of the requisite license, the Appeals Court held that a jury could properly infer such license from the evidence at trial. Two company employees "testified about the company's extensive and open operation of cable television within the town of Pepperell," and that the cable lines ran from telephone poles in town into junction boxes that fed cable lines into residences. There was also the fact that the company "sought the aid of the police in protecting its services from theft, and the police acted upon its request to enforce the provisions of §42A." *Commonwealth* v. *Allen*, 54 Mass. App. Ct. 719, 723 (2002).

The trial judge did err, however, in refusing to instruct the jury that the Commonwealth had to prove that the cable company was licensed under G.L. c. 166A as one of the elements of the offense of obtaining cable television by fraud. At a retrial necessitated in any event by an erroneous suppression ruling, such instruction was required. *Id*. at 724-725.

CRIMES: ROBBERY (ARMED); SUFFICIENCY OF EVIDENCE BEFORE GRAND JURY; FORCE USED IN EVADING DETENTION

A man and woman were observed inside a Wal-Mart store, placing DVD players and movies and a portable telephone into empty store bags, and making their way out of the store without paying for them. A "loss prevention officer" waited until the man and woman had left the building and set off a security alarm, and then approached the man from the front, grabbing the shopping cart and attempting to pull it away from the man. The man let go of the car, but the security officer grabbed the man's arm; in response, the man pulled a knife from his rear pocket, flicked it open, and swept the blade left to right to fend off the security officer. The woman had gotten into a car and drove it toward the scene of the altercation, picking up her accomplice and speeding away. *Commonwealth* v. *Goldstein*, 54 Mass. App. Ct. 863 (2002).

A Superior Court judge allowed the defendants' motions to dismiss the indictments for armed robbery, apparently on the ground that the grand jury heard evidence establishing only larceny, but not robbery, because the knife was produced only after the man relinquished control of the shopping cart. The Appeals Court reversed the dismissals, while finding the question to be

a "reasonably close" one. *Id.* at 870. "A larceny may be converted into a robbery where, as here, a person who has protective concern for the goods taken interferes with the completion of the robbery." *Id.* at 867. While it would be open to a *trial* jury to make a finding that the use of the knife was intended merely to facilitate the culprits' escape (rather than to ensure that the merchandise remained in their possession), and that they had abandoned the earlier felonious enterprise, "the present case is not one in which there was 'no evidence' that the defendants committed armed robbery." *Id.* at 869-870.

CRIMES: PERJURY; RIGHT TO WARNINGS BEFORE GRAND JURY TESTIMONY

Felecia Brown was a seventeen-year-old whose boyfriend had been identified by the victim as the shooter in a serious assault. By all accounts Ms. Brown had been with her boyfriend the night and early morning hours of the shooting. She was interviewed by police ten days after the incident and gave a statement admitting to being at the location of the shooting with her boyfriend but claiming that that they had both been outside the house when it occurred and had left the scene together upon hearing the shots. She was summoned to the grand jury 14 days later. Ms. Brown came to the grand jury with her mother and a guidance counselor. Before testifying, she was questioned by the DA regarding the statement she had initially given to the police, specifically as to whether it was accurate. The guidance counselor intervened at this juncture and advised Ms. Brown not to speak with the DA. Ms. Brown apparently took this advice and did not consent to any questioning until she was sworn and questioned in front of the grand jury. Her testimony was disastrous. It was filled with internal contradictions, illogical, and vague. A subsequent grand jury indicted her for perjury and accessory after the fact. This case, *Commonwealth v. Brown*, 55 Mass. App. Ct. 440, (2002), reveals how vulnerable people are when they are summoned to appear before the grand jury. The appeal was based on the denial of a motion to dismiss due to a failure on the part of the Commonwealth to warn Ms. Brown of her Miranda rights. The Court noted first that, in the facts of this case it was not at all apparent that Brown was even a target of the investigation at the time she appeared and gave testimony. In addition, even if she were a target of the investigation, there is no right to such a warning for grand jury witnesses. It should be noted that the right to such a warning is still an unanswered question with respect to both federal and state law.

DEFENSES: DEFENSE OF ANOTHER

In the wake of a gunfight in Boston the decedent, Lamont Jones was killed, the defendant, Willie Green, was left with a bullet wound in his hip, and Green's friend escaped unharmed. The fight began when Jones approached the front stairs of an apartment building that the defendant and his friend were leaving. Jones and Green had a long and bitter history and it had been escalating in recent days to the boiling point. Jones opened fire on his longtime nemesis, striking the defendant in the hip. The defendant returned fire, as he and his companion retreated into the hallway of the apartment building. Jones was killed during the gunfight. The defendant was indicted on first-degree murder charges. At the close of the evidence he requested an instruction to the jury on self-defense, which was given, and defense of another, which was not given. In denying this instruction, the trial court stated that there was insufficient evidence to establish that the defendant's friend was either the target of the assault or had been exposed to any danger. This was error, albeit harmless error given the jury's verdict of guilty of only the lesser-included charge of voluntary manslaughter. The court, in *Commonwealth v. Green*, 55 Mass. App. Ct. 376 (2002), held that the **defendant was clearly entitled to an instruction on**

"defense of another", regardless of the fact that this third person was not the target of either combatant's gunfire. When either self defense or defense of another is sufficiently raised by the evidence the defendant is entitled to an instruction that places on the prosecution the burden of disproving the particular defense beyond a reasonable doubt. The law regarding this defense is well known: a person is justified in using force against another to protect a third person when a reasonable person would believe his intervention to be necessary for the protection of the third person and, in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself. The Appeals Court recognized what the trial court did not: the defendant's companion, even though he was not the intended target, was certainly in imminent danger of death or serious bodily harm by virtue of his proximity to the defendant and position on the steps within range of Jones's weapon. In finding that the trial court's error was harmless, the Court reasoned that the jury had been correctly instructed on the law of self-defense. In returning a verdict of guilty of voluntary manslaughter, the jury must have concluded that any force used by the defendant in self-defense, even if justified, was excessive. If the jury had concluded that Green had acted in self-defense without excessive force he would have been acquitted. Given that the jury had failed to conclude that the actions taken by the defendant in his own defense were justified and not excessive, there was no basis to conclude that the jury would have considered those same actions justified when undertaken for the defense of another.

DEFENSES: FAILURE TO ISSUE TRAFFIC CITATION

In *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514 (2002), the Appeals Court considered the consequences of a failure to comply with the citation requirement of the 'no-fix' law. G.L. c. 90, s. 2 requires police to issue a citation for all automobile law violations as soon and as completely as possible. The Court held that one of three statutory exceptions to the requirement that a citation issue immediately governed the facts of the case. These exceptions, which are contained in the statute, permit a delay in the issuance of a citation where the violator could not be stopped, where the identity of the violator is unknown, where the precise nature of the violation has not been determined, and lastly, "where the court finds that a circumstance …justifies the failure." This last exception threatens to swallow the rule and it certainly carried the day in this case. The Court held that the failure to comply with the 'no-fix' law is not fatal where the purposes of the statue have not been frustrated. The purpose of the law, according to the Court, is to provide notice to violators. Given the seriousness of the accident involved in this case, as well as the defendant's subsequent conduct in retaining an attorney and attempting to shield assets, the Court found that the record established the defendant's awareness of the violation.

DEFENSES: INTOXICATION WAS INVOLUNTARY (UNANTICIPATED EFFECT OF PRESCRIPTION DRUGS WHEN ACCOMPANIED BY TWO ALCOHOLIC DRINKS)

A police officer came upon the defendant, seated behind the wheel of her car, which had apparently struck another vehicle, which was partially on a lawn. The defendant could offer no explanation of how the accident had occurred, and the officer said that she had slurred speech and her breath smelled of alcohol. He arrested her for operating under the influence of alcohol, and she was taken to the hospital. Some eight hours later, she was taken to the police station for booking, and blew a breathalyzer there indicating a blood alcohol level of .14; a reading of .08 or higher triggers a statutory presumption of intoxication.

At trial, the defendant called a neuropsychiatrist who had begun treating the defendant

about nine months after her arrest. At the time of the accident, the defendant was being treated for attention deficit disorder as well as depression and anxiety, and had been prescribed four medications (Wellbutrin, Effexor, BuSpar, and Ativan), all carrying warnings that they should not be taken with alcohol. The witness testified that at the time of her arrest, the defendant had taken too much prescribed medication which "actively precipitated a manic state." "Combined with the two drinks that she had admitted to imbibing, this state caused her to become psychotic and unable to control her behavior in a rational way." *Commonwealth* v. *Darch*, 54 Mass. App. Ct. 713, 714 (2002). The expert opined that the defendant's decision to drive, which occurred just after she had attempted to commit suicide by blocking the tail pipe of the car's exhaust system, was influenced by delusions. Notwithstanding this evidence, defense counsel at trial did not press the issue of criminal responsibility, "save for a few sentences in his closing," and failed to ask for an instruction on this defense. *Id.* at 717. Appellate counsel argued that the defendant had been deprived of the effective assistance of counsel.

The Appeals Court was very troubled by this state of affairs, and remanded the case for the filing of a motion for new trial and evidentiary hearing to be conducted by the trial judge. *Id.* at 718. Though the Commonwealth argued that drug or alcohol abuse, i.e., voluntary consumption of alcohol, rather than a underlying "disease or defect," is never a viable basis for a claimed lack of criminal responsibility, the Court pointed out that the question was whether the defendant's intoxication was, in fact, voluntary. *Id.* at 717. The record did not reveal what, if anything, the defendant was told about the side effects of her medications, and "there was little evidence whether the alcohol was a triggering, or merely an exacerbating, factor with respect to her diminished state." *Id.*

DEFENSES: SELF-DEFENSE, "CASTLE LAW" (G.L. c. 278, §8A); INEFFECTIVE ASSISTANCE OF COUNSEL NOT ESTABLISHED

The defendant was convicted of second degree murder on an indictment charging first degree murder. Following a direct appeal which affirmed the conviction and the denial of a motion for new trial, the Appeals Court reversed the denial of the motion for new trial; on further review, however, the SJC reinstated the denial. The defendant had claimed that his trial attorney provided ineffective assistance in failing to request that the jury be instructed on the so-called "castle law" amendment to the common law duty of a person acting in self-defense to retreat if possible. Specifically, if a person is in his own dwelling at the time of the offense and acts in the reasonable belief that the person unlawfully in the dwelling is about to inflict great bodily injury or death upon the occupant or another person lawfully in the dwelling, the dwelling occupant may use reasonable means to defend himself, and "[t]here shall be no duty on said occupant to retreat from such person unlawfully in said dwelling." G.L. c.278, §8A. The SJC pointed out that the deceased in this case was the defendant's own brother, and that he had been an invited and frequent guest on the premises: nothing in the statute eliminated the duty on the part of the dwelling occupant to retreat from a confrontation with a person who is lawfully on the premises. It is also true, however, that a person who has entered a dwelling lawfully becomes a trespasser when he refuses to leave after having been ordered to do so. The Court acknowledged that if a castle law instruction had been requested by trial counsel, it was "possible" that it "should have been given to the jury, along with instructions regarding the manner for determining whether a person is 'unlawfully in the dwelling.'" *Commonwealth* v. *Peloquin*, 437 Mass. 204, 209 (2002).

The Court found that the defendant had established NEITHER than the failure to request the instruction constituted serious incompetency or inattention by counsel nor that it deprived the

defendant of "an otherwise available substantial ground of defence." *Id.* at 209-210. As actually tried, the case presented the jury with "a stark contrast between the Commonwealth's and the defendant's accounts of the confrontation," the defendant's version explicitly claiming that he had shot the victim only after the victim grabbed a gun out of his own waistband, under circumstances which indicated that he was about to shoot the defendant and allowed no possibility of the defendant's "retreat" from his own livingroom, even though he "dived out of the chair that he had been sitting in." *Id.* at 207.

DISCOVERY: PROSECUTION WITNESSES' CRIMINAL RECORDS

On appeal of the denial of his motion for new trial, the defendant (having been convicted of first degree murder) claimed that the prosecutor was guilty of misconduct in "withholding" evidence of criminal records of three Commonwealth witnesses, because these criminal records constituted "exculpatory evidence." The Supreme Judicial Court noted that the defendant had not requested such information from the district attorney, and held that the district attorney was barred from providing them in any event, citing G.L. c. 6, §172. "The proper route for the defendant to obtain prior convictions of prospective witnesses for the Commonwealth is by requesting the judge to order the probation department to produce them." *Commonwealth* v. *Martine*, 437 Mass. 84, 95 (2002). Furthermore, defense counsel here made just such a motion, AND it was rather apparent from the witnesses' statements that they came from a criminal milieu. The Court rejected arguments that trial counsel had been professionally remiss in not exploiting this fact in some manner other than he did. *Id.* at 92-93.

DISCOVERY: SANCTIONS AFTER PROSECUTION'S VIOLATION

In *Commonwealth v. Gonzalez*, 437 Mass. 276 (2002), the defendant was charged with a violation of the controlled substances act in a school zone. As of the date of trial the prosecution had not turned over the drug analysis or the school zone measurements. The defendant moved to exclude them. The motion was allowed and the prosecution then indicated it was not ready for trial, which was nonetheless conducted over the prosecution's objection. The Court held that this was an inappropriate sanction for an "alleged" discovery violation. The reasons for the Court's reversal limit the reach of this case. The Court certainly did not suggest that such a sanction is impermissible, just that it should be reserved for more serious transgressions where there is evidence to suggest that the defendant has actually been prejudiced. The Court first noted that the Commonwealth had not agreed to turn over the discovery by any particular date: the pre-trial conference report had the notation "unagreed" next to the discovery compliance date of May 22. The Court also emphasized that there was no showing of prejudice to the defendant by the delayed disclosure; there was no request for a continuance by the defendant to conduct investigation of the tardy disclosure. Finally there was no showing of bad faith or intentional misconduct by the prosecution. One thing that clearly upset the Court was the trial judge's rush to swear a witness after his ruling on the motion in limine, thereby ensuring that jeopardy attached. The court noted that in these cases, where a motion in limine's allowance will have the effect of terminating a prosecution, the Commonwealth should be on the same footing as in the case where a motion to suppress (or dismiss)is allowed, i.e, an interlocutory appeal pursuant to Mass. R. Crim. P.Rule 15 should be allowed.

DISMISSAL FOLLOWING NO ADMISSION TO SUFFICIENT FACTS AND PRE-TRIAL PROBATION

A **Brandano** disposition, to the limited extent that it continues to exist, will only survive appellate review if the procedures recommended in the Brandono case are scrupulously followed. The Brandano case implicitly sanctioned the practice in the District Court of allowing a complaint to be continued for a set period of time, and ultimately dismissed, without the defendant ever having to plead guilty or admit to sufficient facts. For a time, this disposition was available even where the prosecution objected to the dismissal. In *Commonwealth v. Sattelmair*, 55 Mass. App. Ct. (2002), the protocol established in Brandano and its progeny was largely ignored, and a criminal complaint was ultimately dismissed over the Commonwealth's objection. In vacating the dismissal the court demanded strict compliance with the protocol. First, the defendant must submit an affidavit signed by a person with personal knowledge of the factual basis of the motion to dismiss. In *Sattelmair*, counsel, who had no personal knowledge of the facts, signed the affidavit. Second, the prosecution should file a counter-affidavit if it opposes the defense position. Here, the prosecutor simply made an oral presentation at the time of the hearing. Third, the court is to hold a hearing on disputed factual issues revealed by the affidavits. In *Sattelmair*, no evidence was taken: the judge simply made a finding that there was no factual dispute and that the interests of public justice were served by a dismissal of the complaint. The Appeals Court held that this finding had no basis in fact and amounted only to a "judicial disagreement with the Commonwealth's election to prosecute". In dismissing the case, the motion judge had impermissibly encroached upon powers reserved to the executive branch of the government by Article 30.

DOUBLE JEOPARDY: ACQUITTALS AT TRIAL NOT ALL EQUAL

In *Commonwealth v. Gonzalez*, 437 Mass. 276 (2002), discussed in DISCOVERY: SANCTIONS the prosecution refused to move for trial after the allowance of the defendant's motion to exclude the drugs and the school zone measurements. The judge then allowed the defense to call a witness (the defendant's daughter) who had no personal knowledge about any fact at issue. The witness simply introduced herself, identified the defendant, and sat down. There was no cross-examination by the prosecutor. The trial judge then entered a verdict of not guilty. This acquittal was vacated on appeal. It is difficult to say what precedential value the case has, because although the proceeding was deemed to be not a 'trial' for double jeopardy purposes, other cases whose facts come fairly close to those in this proceeding were neither rejected or overruled. The Court simply stated that in "appropriate circumstances, an appellate court will scrutinize a trial judge's label of 'acquittal' for double jeopardy purposes." Id. at 283. In this case, because the prosecutor had not moved for trial, had not called any witness, had not cross-examined the one (non-percipient) witness who was called, and was deprived of any opportunity to seek an interlocutory appeal, the Court held that the defendant had never been placed at risk of conviction.

DOUBLE JEOPARDY: MOOT QUESTION

What is supposed to happen after a mistrial due to a hung jury? A reversal after a conviction? A new trial, right? Not so fast. Double jeopardy principles may bar a retrial in certain cases. To preserve this double jeopardy issue it must be asserted. See *Commonwealth v. Spear*, 43 Mass. App. Ct. 583 (1997). This can be done by filing a motion to dismiss in the trial court. If the motion is denied, G.L. c. 211, § 3 offers the promise of relief without subjecting the defendant to a second prosecution. In *Clarke v. Commonwealth*, 437 Mass. 1012 (2002), the defendant did all

the right things. Nevertheless, he was retried and ultimately convicted. While his appeal from the denial of his 211, §3 petition is now moot, the issue is preserved and will be considered in the course of his appeal.

DOUBLE JEOPARDY: RETRIAL BARRED BECAUSE INSUFFICIENT EVIDENCE SUPPORTED THEORY ON WHICH JURY RETURNED VERDICT

The defendant was stopped for motor vehicle violations. In the course of this stop, a package on the floor directly behind the defendant was seized and found to cocaine a large amount of cocaine. The defendant testified that he had been hired to make repairs on the vehicle, after which he was to drive the vehicle back to a Hispanic restaurant in Chelsea. He had adjusted the driver's seat forward when he took the wheel to obtain parts to make the repairs, but during this journey was stopped by the trooper. He denied any knowledge of the package; it must have been under the driver-owner's seat but came into viewing range only after he adjusted the seat forward. The jurors were given three options on the verdict slip: guilty of trafficking "based solely on his participation," guilty under a joint venture theory," and "not guilty." They were instructed that only one box would be checked by the foreperson: "Not guilty, guilty or guilty under a joint venture theory." The jury returned a verdict of guilty under a joint venture theory. *Rendon-Alvarez* v. *Commonwealth*, 437 Mass. 40 (2002). The Appeals Court reversed the conviction because the trial judge allowed testimony that the defendant had asserted confusion and refused to continue answering police questions. *Id.* n. 2, citing 48 Mass. App. Ct. 140, 141 (1999). Before retrial, however, the defendant moved to dismiss the indictment, arguing that there was insufficient evidence to go to the jury on a theory of joint venture and that he had been found "not guilty" under an individual liability theory. The trial court judge allowed the motion as it applied to the joint venture theory, but ordered that retrial could proceed on the theory of trafficking as the principal. The defendant sought review by a petition pursuant to G.L. c. 211, §3. Although a single justice denied relief, an appeal to the full bench from this order resulted in an order dismissing the indictment.

The Court's opinion analyzed the instructions given the jury to determine whether the verdict as returned indeed meant, as it seemed on its face, an "acquittal" on the theory of individual liability, i.e., of the defendant's own possession of the drugs with the intent to distribute them. The justices disagreed with the Commonwealth's contention that, in order to have found the defendant guilty of trafficking on a joint venture theory, the instructions as given required the jury to have found individual liability as well, such that there had been no "acquittal" on that theory. Instead, the instructions most likely sought "to explain that in order for a joint venture to exist there must be someone (but not necessarily the defendant) who acts as a principal." 437 Mass. at 45.

DOUBLE JEOPARDY: SEPARATE CONVICTIONS & CONSECUTIVE SENTENCES PERMISSIBLE FOR CRIMES OCCURRING DURING ONE "EPISODE"

See *Commonwealth* v. *Lord*, 55 Mass. App. Ct. 265, 272-273 (2002), summarized at ***CRIMES: ASSAULT AND BATTERY BY MEANS OF DANGEROUS WEAPON; CHEMICAL MACE AS DANGEROUS WEAPON (PER SE)***.

DOUBLE JEOPARDY: UNIT OF PROSECUTION FOR "ACCESSORY AFTER THE FACT"

The Commonwealth's evidence was that the defendant, one of the founders of a

particular gang, lived with the aunt of a gang member who fired shots from a moving vehicle and hit two individuals. The shooter parked the car in a vacant lot next to the defendant's house and went in to see the defendant. The defendant subsequently arranged for another gang member who lived in New York to come to Springfield to take away the shooter; other evidence supported the inference that the defendant moved the car to a location further away from his home, and that he removed its license plate. *Commonwealth* v. *Perez*, 437 Mass. 186 (2002). He was charged in two indictments with being an accessory after the fact to assault and battery by means of a dangerous weapon, and moved to dismiss one of the indictments on the ground that the alleged "assistance" he provided was the identical as to both indictments, such that he was being charged twice for the same offense. The argument was unsuccessful both in the trial court and in the SJC. While the latter Court recognized that many commentators and States have taken "an approach to this crime that focuses on the defendant's conduct in obstructing justice or impeding law enforcement, rather than treating the defendant as an accomplice of the principal with a form of derivative liability for the principal's crimes," its opinion stated that the Massachusetts statute "remains in the common-law form." The defendant's liability thus remained linked to the actual crimes that the assisted felon perpetrated, so two "accessory" convictions were valid. *Id.* at 194. The fact that he may not have known precisely how many persons were hit by the gunfire was not relevant. ("Even as to the principals, there was no requirement that they know precisely how many people they had actually struck." *Id.* at 196.)

EVIDENCE: CONSCIOUSNESS OF GUILT; EVIDENCE OF 'FLIGHT' NEEDN'T BE 'CONCLUSIVE' TO JUSTIFY INSTRUCTION

The Commonwealth's evidence was that the juvenile and another set upon a youth as he left a store carrying ice cream, and that the youth was beaten with fists and a belt. The Commonwealth claimed that an instruction on "consciousness of guilt" was warranted because the juvenile had fled the scene of the fight upon the arrival of the police; defense counsel countered that the evidence equally supported the proposition that the juvenile had left the scene before the arrival of the police, and that there was thus no "flight" arguable as a consciousness of guilt. The Appeals Court held that the evidence didn't have to be "conclusive" as to the precise point of the juvenile's departure: officers testified that "as they arrived at the scene," they saw several youths running away, and the purported victim testified that he saw the police "immediately after his *attackers* had fled." This was an adequate foundation for a "balanced" consciousness of guilt instruction. *Commonwealth* v. *Lamont L*, 54 Mass. App. Ct. 748, 752-754 (2002).

EVIDENCE: CONSCIOUSNESS OF INNOCENCE; POLYGRAPH EXAM

The defendant argued that the trial judge erred in excluding evidence that the defendant told police that he was willing to undergo a polygraph examination; according to the defense, this was indicative of a consciousness of innocence. The SJC held that any offer to submit to a polygraph exam is "inadmissible." The results cannot be used in evidence in this Commonwealth, whether they are favorable or unfavorable, so the offer "is a self-serving act with no possibility of risk." *Commonwealth* v. *Martinez*, 437 Mass. 84, 88 (2002). Notwithstanding the SJC's view, it seems unlikely that an accused would know the state of the law in Massachusetts, and unfair that his offer was dismissed out of hand on a rationale presuming such knowledge on his part.

EVIDENCE: EXPERT PSYCHOLOGICAL EVIDENCE CONCERNING "DISSOCIATIVE TRANCE DISORDER" SHOULDN'T HAVE BEEN EXCLUDED BY TRIAL JUDGE IN HER 'GATEKEEPER' DAUBERT-LANIGAN FUNCTION; BASIS FOR 'LACK OF CRIMINAL RESPONSIBILITY' DEFENSE

A forensic neuropsychologist was called by the murder defendant and testified during a voir dire that she believed the defendant to have been suffering from the combined effects of dissociative trance disorder (DTD), moderated diffused neurological impairment, acute stress disorder, and mild generalized anxiety disorder at the time of the killing, making him unable to conform his conduct to the requirements of the law. The trial judge excluded expert evidence on DTD on the asserted ground that it was "new and novel and not scientifically reliable." The Appeals Court, however, held that the trial record did not support this basis for exclusion: DTD is a recognized "research" category in the Diagnostic and Statistical Manual of Mental Disorders," and the fact that it was not codified as a specific "diagnostic category" in DSM-IV did not mean that it is not a recognized disorder. The disorder has been the subject of peer review articles and publications, and diagnosis of the condition utilizes generally accepted testing instruments. *Commonwealth* v. *Montanez*, 55 Mass. App. Ct. 132, 145-146 (2002). The defendant's conviction was reversed on another ground. At any retrial, expert evidence similar in substance to that which was proffered the first time around should not be excluded unless the Commonwealth offers rebutting information materially undermining the scientific reliability of, and recognition in the psychiatric profession of, the diagnosis of DTD as a mental condition. *Id.* at 146. Whether the evidence will entitle the defendant to an instruction on lack of criminal responsibility (*McHoul*, 352 Mass. 544 [1967]) would have to be decided by the trial judge in light of all the evidence presented.

EVIDENCE: FRESH COMPLAINT; DETAILS OF STATEMENT

In *Commonwealth v. Washburn*, 55 Mass. App. Ct. 493 (2002), summarized in CRIMES: DISSEMINATION OF MATTER HARMFUL TO MINOR, the Court reiterated its approval of the Massachusetts version of the fresh complaint doctrine whereby the details of the fresh complaint are admissible, not just the fact that an accusation was made in the aftermath of a sexual assault. The Court also included a short primer on the state of the law as well. On direct examination a complainant may testify only to the fact that she made a fresh complaint and who it was made to. She may not testify at this juncture about any details of her complaint, nor may she self-corroborate. (Of course, during cross-examination any inconsistencies contained in the fresh complaint may be elicited.) A fresh complaint witness may testify to both the fact of the complaint and the details of the complaint as related by the complainant, but may not fill any gaps in the prosecutor's case. If the defense does cross-examine the complainant about the fresh complaint by eliciting inconsistent details, on re-direct the prosecutor may then and only then question the complainant about the details of the fresh complaint.

PRACTICE TIP: Prior constituent statements are hearsay. They do not become admissible simply because the witness has been impeached by a showing of statements inconsistent with the witness's testimony. See, e.g. , *Commonwealth v. Zukowski*, 370 Mass. 23 (1976). Further, the rule of "completeness" does not operate to make admissible the entire out-of-court statement. The proponent of admission of further matter in the statement must establish that it "explains" or "qualifies" that which has been admitted. *Commonwealth v. Clark*, 421 Mass. 1, 14 (2000).

EVIDENCE, HEARSAY: BUSINESS CARDS NOT ADMISSIBLE TO ESTABLISH TRUTH OF MATTER ASSERTED THEREON; LIABILITY FAIR WHETHER DENOMINATED 'JOINT VENTURER' OR 'PRINCIPAL'

The Commonwealth's evidence was that the defendant was the "main man"/supplier of a Springfield drug seller; the Springfield seller conveyed to an undercover officer a cocaine sample, and upon its approval by the officer, delivered eleven ounces of cocaine later. At both deliveries, the seller was driven to the site by the defendant, who dropped off the seller at the front of the apartment building and then parked the car before going to the lobby and waiting for the seller. The seller was the chief prosecution witness against the defendant, and testified that the defendant was his supplier and was from New York. Apparently to bolster the credibility of the seller, the Commonwealth offered several business cards purporting to have issued from businesses in New York, along with a receipt from a health club listing a New York address. These were taken from the defendant's wallet at the time of his arrest. The defendant objected, correctly. "[T]he business cards should have been excluded as hearsay" because "they were offered to support the defendant's connection to New York based on the truth of the assertion that the businesses are located at the New York addresses listed thereon." *Commonwealth* v. *Ramirez*, 55 Mass. App. Ct. 224, 227 (2002). Though the Appeals Court evinced puzzlement at the "impruden[ce]" of the prosecution in risking reversal "on an issue so attenuated from the question of the defendant's guilt," the error was deemed pretty much harmless given the abundance of other evidence of guilt. *Id.* at 229.

The defendant also argued on appeal that while the evidence was sufficient to establish criminal liability as a principal, a conviction on a 'joint venture' theory could not stand. Without discussion, *id.* at 230, the Court sited Commonwealth v. Sanchez, 40 Mass. App. Ct. 411, 418-419 (1996), with the parenthetical, "(joint venture appropriate where participants act together toward a common end and where it is unnecessary 'to decide who was a principal and who a helper — for each is guilty whether acting in one or the other role or successively in both')."

EVIDENCE, HEARSAY: DYING DECLARATION; [IN]CREDIBILITY OF WITNESS RELATING SUCH ALLEGED STATEMENT

The homeless defendant and his girlfriend were charged with murdering a man in an altercation over the use of an abandoned railroad shed. The defendant, in his eventual statement to police and in his trial testimony, claimed that he had stabbed the man in self-defense. The girlfriend bargained down to no jail time: she was the prosecution's star witness. About fifteen months after the death, the girlfriend claimed for the first time that after the defendant had stabbed the man, the man had cried out, "You've killed me, let me die in peace," but the defendant responded to this plea by repeatedly jumping on the man's chest, saying "die, die, die, die." *Commonwealth* v. *Little*, 54 Mass. App. Ct. 877, 879 (2002).

On appeal, but not at trial, defense counsel argued that even if the girlfriend's testimony met the technical requirements for dying declarations testimony (1. in a prosecution for homicide 2. committed upon the declarant, 3. the declarant's out-of-court statement in regard to the manner in which he met his death is admissible, 4. provided he believes his death is imminent, and 5. provided that he does in fact die within a short time), the judge should have acted in a "gatekeeper" capacity to bar the testimony because of circumstances suggesting strongly that the girlfriend fabricated the alleged entreaty. The Appeals Court did not discount the factors impugning the girlfriend's reliability, but "[w]hether to believe the witness who repeats the dying person's declaration has always been a jury question." *Id.* at 881. The weaknesses were

"exhaustively" plumbed in cross-examination and the judge's instructions to the jury specifically mentioned that the jury could consider the girlfriend's motive in testifying and whether she had any interest in the outcome of the case.

EVIDENCE: HEARSAY

In *Commonwealth v. Mazzone*, 55 Mass. App. Ct. 345 (2002), the defendant was charged with rape of a child and related offenses. The acts allegedly began when the complainant was eleven years old and the defendant was twenty-one. They continued for a period of four years. The defendant was a friend of the complainant's family. They did not live in the same house. At trial the Commonwealth introduced a letter the complainant wrote, addressed to "no one in particular" two years after the last alleged rape. The letter was a subjective recounting of the relationship between the complaining witness and the defendant over the past four years, including details of the alleged sexual acts between the two. There was no objection. The Court called this textbook hearsay, which permitted the complainant to corroborate his own testimony. It was error to admit it. This error, together with the erroneous admission of certain fresh complaint testimony (which was objected to), was sufficient to require reversal given that the central issue in the case was credibility.

EVIDENCE: HEARSAY; FRESH COMPLAINT

In *Commonwealth v. Mazzone*, 55 Mass. App. Ct. 345 (2002), a conviction for rape of child was reversed due to the erroneous admission of certain hearsay evidence, including the fresh complaint testimony of the complainant's mother, brother, and therapist. "Freshness" was very much at issue. The complainant made the statements between four and twelve months after the last alleged act of abuse. In ruling on the admissibility of the testimony, the only thing the Judge Connelly considered, to the extent he considered anything, was the time lapse between the crimes and the 'disclosure.' The Court reviewed the various factors that will determine whether the "victim's actions were reasonable in the particular circumstances," which is the test for determining the admissibility of fresh complaint evidence. The relevant factors are the child's age, the length of time the child has been away from the abusive setting, whether the perpetrator used threats or coercion, and whether the perpetrator is a relative or close friend of the child. Although the time span at issue in this case fell within the outer limits of decided cases, no other factors were adduced to adequately explain the delay. Although the defendant was a close friend of the complaint's family, the complainant was a teenager, he did not live with the defendant, and there was no allegation of force, threats or intimidation. Finally, with respect to the 'disclosure' to the therapist in particular, the statements were not spontaneous but were responses evoked by the therapist. Given all of this the admission of the fresh complaint evidence was erroneous. The conviction was reversed.

EVIDENCE, HEARSAY: 'INDIRECT' HEARSAY; ADMISSION OF TESTIMONY FOR PURPORTED PURPOSE OF 'EXPLAINING WHY TRIAL WITNESSES ACTED AS THEY DID'

See *Commonwealth* v. *O'Connell*, 55 Mass. App. Ct. 100, further appellate review **allowed**, 437 Mass. 1106 (2002), summarized at ***CRIMES: FORGERY, UTTERING, LARCENY OVER $250; FAILURE OF PROOF OF INTENT TO DEFRAUD WHEN SIGNING CHECKS***, and Practice Tip following that summary.

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE vs FRESH COMPLAINT (SUBSTANTIVE USE vs CORROBORATIVE USE)

The defendant and complainant had encountered each other as they were at several drinking establishments with mutual friends and acquaintances. Both ended up at the home of a male cousin of the complainant. A friend of the complainant eventually repaired, with the cousin, to the cousin's bedroom. The complainant fell asleep on a sofa. The defendant was asleep on the floor. Thereafter, the complainant awakened because the defendant's hand was inside her shorts and his finger was penetrating her vagina; he also had his mouth on her exposed breast, her shirt and bra having been undone as she slept.

It seems that the complainant immediately, frantically, and loudly complied with any common law expectation of "hue and cry." She yelled, she ran, she burst in upon her friend and cousin, and she had thrown herself to the ground outside, hysterically screaming and crying still when the police arrived about five minutes later. The yelling and screaming was to the effect of "I can't believe he would do this to me. He had my shirt off. He had his hands up my shorts ... his fingers inside of me .... his mouth on me. Why would he do this to me?" A responding police officer testified that she was "hitching and gasping," having difficulty speaking and breathing. *Commonwealth* v. *Davis*, 54 Mass. App. Ct. 756 (2002).

Evidence which is admissible as a spontaneous utterance might also qualify as a fresh complaint. If the statement is admissible as a spontaneous utterance, "it is not subject to the limitations on statements that only qualify as fresh complaint," i.e., it's not merely "corroborative," but may be used substantively. While "fresh complaint" evidence shouldn't be "excessive" because of the danger that it may be misused, for substantive effect, the abundance of testimony as to the woman's spontaneous utterances was not subject to such a limitation. Given that there was already so MUCH substantive and corroborative evidence as to the incident, it was difficult to justify admission of statements made by the complainant the day after the event, though they would have otherwise been appropriately received as "fresh complaint." Even assuming "it was impermissibly used by the jury as substantive evidence, it was merely cumulative of multiple other permissibly admitted statements of [the complainant], as well as her direct testimony." *Id.* at 765.

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE; THE DEMISE OF THE RIGHT OF CONFRONTATION, THE RIGHT TO MEET ACCUSERS 'FACE-TO-FACE'

In an appalling disregard for the function of appellate review and for any oath to uphold against encroachment the Constitutions of the Commonwealth and the United States, the Appeals Court has now mouthed that trial judges have "discretion" to call just about any alleged out-of-court assertions "spontaneous utterances" so that a defendant may be convicted without the pesky bother of proffering actual percipient witnesses to an alleged criminal act.

A policewoman's testimony was the only evidence presented by the Commonwealth. She testified that when she arrived at a Brookline address in response to a call at 12:05 a.m., she believed that the defendant's mother, who was standing on the porch with the defendant, looked "very guarded, nervous" and "didn't really want to look at" the defendant. The policewoman proceeded to speak with the mother out of the hearing of the defendant. According to the policewoman, the mother said that the defendant had awakened her, demanded that she give him back money he had previously given her for rent, and struggled with her over her pocketbook when she refused. According to the policewoman, the mother also alleged that the defendant "threatened to destroy her room if he did not get what he wanted," and "[s]he knew he wanted

the money for drugs." *Commonwealth* v. *Carter*, 54 Mass. App. Ct. 629, 630 (2002).

There was no testimony that the mother was distraught, visibly upset, or in shock. The arithmetic, nonetheless, is: allegation = true, presumption = guilt. When guilt of the criminal act is presumed, there is the foundation for finding that the self-described victim of the criminal act was fearful and nervous, and that therefore what she purportedly said to the police officer was reliable. The trial judge thus "could properly determine that the foundational requirements of the spontaneous utterance exception to the hearsay rule had been met [.]" *Id.* at 632. Perhaps also the defendant "looked" like someone who would threaten his mother and abuse drugs. Prosecutions will be ever so much more efficient now, won't they?

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE; OUT-OF-COURT IDENTIFICATION; TESTIMONY THAT CHILDREN CALLED DEFENDANT 'DADDY'

The Commonwealth's rather overwhelming evidence was that the defendant drove up to where his estranged girlfriend was standing with three children waiting for a school bus for the eldest, a four-year-old, and that after an angry exchange of words, he fatally shot her. Both the four-year-old and the three-year-old boy said repeatedly throughout the day that "daddy shot mommy." These assertions were legitimately admitted as spontaneous utterances. As to testimony by several persons that the two boys referred to the defendant as "daddy," the Court held that the evidence was not hearsay: it was not admitted for the "truth" of whether the defendant was their biological father (although he was the biological father of the three-year-old and his own testimony acknowledged that the four-year-old called him "daddy"), but instead "for the limited purpose of explaining the children's use of that term." *Commonwealth* v. *Kenney*, 437 Mass. 141, 152 (2002).

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE; OUT-OF-COURT IDENTIFICATION, RECANTED SPONTANEOUSLY (LONG BEFORE TRIAL); FINGERPRINT EVIDENCE, SUFFICIENCY OF

A gas station attendant hit an "emergency" alarm in his kiosk, and reported to responding officers that he had let a man use the telephone in the kiosk and that the man subsequently pulled a knife on him, which he had tried to grab, before he "went blank." The arriving replacement worker testified that $160 was missing from the night's receipts. Over the defendant's "hearsay" objections, a police officer and the attendant's supervisor were allowed to testify to what the attendant had told them on the night of the incident, i.e., that the man had held a knife to the attendant's face, that there had been a struggle, that the man took money from his pocket, and that the man had torn the phone out of the wall and thrown it onto the floor. Though the trial judge purported to find these statements admissible as "spontaneous utterances," and there was testimony that the attendant appeared shaken and disoriented, the Appeals Court held that the statements were NOT admissible as spontaneous utterances. It turned out that the attendant had taken pains to tailor his account of the incident to avoid getting into trouble himself; the alleged attacker had been in the attendant's company for an hour, and had provided him with several beers, which he had drunk, and he had disposed of the empty cans before the arrival of the police and his supervisor. The attendant revealed these facts for the first time about nine months after the incident. "[I]t is clear from his intentional omissions that [the attendant] had sufficient time to think about the contents of his statements" and the statements were thus not admissible as "spontaneous" utterances whose admissibility is premised upon a lack of premeditation and thus possible fabrication. *Commonwealth* v. *Newell*, 55 Mass. App. Ct. 119, 123 (2002). The Court

held that no prejudice accrued from the admission of the statements, despite the defendant's stringent argument that, without the hearsay testimony, there was insufficient evidence of a robbery. Simply because there was sufficient evidence for conviction without the inadmissible hearsay (i.e., the subsequent attendant testified that $165 was missing, and the attendant himself had testified to having had money in his pocket and having been assaulted with a knife before going "blank"), the Court shrugged off the error. *Id.* at 124.

A fingerprint of the defendant was found on the telephone, but the defendant argued that he had been entitled to a required finding of not guilty because this was the sole evidence linking him to the crimes and there was no proof that the fingerprint was placed upon the telephone at the time of the crime. The attendant had testified that he had let persons use the telephone in the kiosk on many occasions, though he had been told not to do so. The answer to the required finding issue turned upon whether the prosecution was entitled to use substantively an identification of the defendant made by the attendant at the probable cause hearing occurring some nine months after the crime; the attendant made no identification at trial, and indeed had contacted the prosecutor and defense counsel shortly after the probable cause hearing to inform them that he was no longer sure of his identification. The Appeals Court noted that the probable cause hearing identification was acknowledged by the attendant at trial and that the attendant was then available for cross-examination on the topic, and claimed that the identification had not been the result of leading questions by the prosecutor. "The fact that [the attendant] later recanted his testimony goes to the weight, not the admissibility of the positive identification." *Id.* at 127. Accordingly, the out-of-court identification was substantively admissible and thus the fingerprint evidence was not the sole evidence of guilt. *Id.*

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE; HEAD 'NOD' IN RESPONSE TO PERSISTENT LENGTHY QUESTIONING LACKS NECESSARY FOUNDATION

Officers "were dispatched in response to reports of a fight," and arrived at an apartment occupied by the defendant and his wife. According to a police officer, he observed blood splattered on the floor and on a table in the kitchen, and on the wife's leg. The wife was speaking Polish, would not stand still, and her "crying was constant." She tried to avoid attention from anyone in the apartment, but was eventually convinced to leave with medical attendants. The officer followed, and waited for ten or fifteen minutes outside the hospital room to which she was taken. Although she began crying again when he entered her room, he proceeded to question her. She was very upset, her breath smelled of liquor, and her eyes were very red. She spoke very little English, and had great difficulty understanding the officer, but he asked her the same question[s] over and over in an interview lasting for forty-five minutes. The officer believed that she conveyed to him that her husband had killed and buried a deformed kitten some days earlier. "He then asked her if the incident with the kitten was 'the reason why [the defendant] stabbed you.'" She purportedly nodded her head up and down. *Commonwealth* v. *Pierowski*, 54 Mass. App. Ct. 707, 709 (2002).

The wife testified for the defense at trial, to the effect that the knife wounds she sustained were accidental. *Id.* at 708 n. 2. The officer's testimony, above, was what convicted the defendant of assault and battery by means of a dangerous weapon. The conviction was reversed on the ground that the "head nod" was not made under the influence of an exciting event, and thus did not meet a foundational requirement for the "spontaneous utterance" exception to the prohibition against hearsay. It was "not 'made under the immediate and uncontrolled domination of [her] senses,' ... but was elicited by the persistent questioning of the police officer,

after [the wife] had unambiguously attempted to avoid the attention given to her." *Id.* at 711.

The fact that the wife testified for the defense at trial, recanting her purported "statement" to the officer, was argued by the Commonwealth to obviate any error. The Court rejected this contention, *id.* at 712 n. 9. While it seems that the Court should have ordered a required finding of not guilty, the 'bottom line' of the opinion asserted that the Court was "revers[ing] the judgment and set[ting] aside the verdict."

EVIDENCE, HEARSAY: SPONTANEOUS UTTERANCE; STATEMENT OF UNIDENTIFIED PERSON

The Commonwealth's evidence was that the defendant was one of a group of individuals purportedly affiliated with the "La Familia" gang who beat and kicked the victim, who was wearing beads in the colors of the "Latin Kings" gang and who was identified by his attackers to have such an affiliation. The Commonwealth further contended that the defendant pulled out a gun and shot the victim three times after he first crawled out of an alley, but then collapsed next to a building. A witness was allowed to testify that he heard "a girl who had been in the crowd around the beating yell, 'Why did Sammy have to do that?'" The defendant's first name was Samuel. *Commonwealth* v. *Correa*, 437 Mass. 197 (2002). The Appeals Court held that this yell was admissible as an excited utterance, notwithstanding the fact that the speaker wasn't identified, apparently because "there is no unavailability requirement" for admission of spontaneous utterances. The Court claimed that it was "inferable" that the speaker had seen the exciting event and that the yell was made under its influence, "a spontaneous reaction to the traumatic event of the shooting [.]" *Id.* at 202.

EVIDENCE: HEARSAY: SPONTANEOUS UTTERANCE: MOTIVE TO LIE

A career criminal with outstanding warrants for his arrest was seen running down a street in Dorchester. He was screaming and blood covered his face and hands. When stopped by police he claimed in an excited and spontaneous way that he was the innocent victim of an attack inflicted by the defendant. He claimed he and his girlfriend had gone to the defendant's home a few minutes earlier. Upon their arrival, the defendant and his brother chased them away with a bat and a knife. The alleged victim then stated that the defendant caught up with him as he reached his car and smashed the car window with a bat and began to beat him with fists, feet, and the aforementioned bat. He fled this beating moments before the police saw him running down the street. The police brought him back to the scene of the alleged attack and placed the defendant and his brother under arrest. While there, the victim's girlfriend appeared and stated that she had witnessed her boyfriend being kicked and hit with a bat. She also claimed that she had been hit with a beer bottle. Officers searched the scene for the bat and knife. They then searched the defendant's apartment. Neither object was found. There was no indication that glass was found at the scene. After being treated by EMTs, the victim repeated his accusations. Neither the alleged victim nor his girlfriend appeared for trial. At the trial of this complaint the out of court statements of both the alleged victim and his girlfriend were admitted as exited utterances. The defendant objected, arguing that, due to the outstanding warrants for his arrest and his long criminal history, he had a motive to be less that honest in his statements to the police. In *Commonwealth v. Joyner*, 55 Mass.App.Ct. 412 (2002), the Court upheld the ruling as within the discretion of the trial court. The only question for the trial court on a motion to exclude such evidence is whether the out of court statement was made while under the influence of an exciting event and before the declarant had time to contrive or fabricate the remark. "The

judge should not inquire as to whether the statement is in fact credible." Id at 415. This, the court held, was the province of the jury.

EVIDENCE, HEARSAY: STATEMENT OF "PASSERBY"

The complaining witness testified that the defendant, with whom she had spoken previously that day on the street, grabbed her as she left her apartment and held her face while attempting to "stick his tongue into her mouth." The complainant testified that a passerby stopped during the incident and asked "Hey, are you all right?," and that the defendant fled after the pedestrian asked this question. *Commonwealth* v. *Daley*, 55 Mass. App. Ct. 88, 94-95 n. 9 (2002). "[T]o the extent the testimony focused on the defendant's sudden departure from the scene, it was not hearsay." *Id.* "By contrast, to the extent the testimony was introduced as an assertion that the complainant was not in fact 'all right,' it would likely fall within the hearsay rule." *Id.* In this case, the trial judge had barred the prosecutor from arguing any inference of "consciousness of guilt," because when asked in discovery for notice of any such alleged evidence, the prosecutor had responded that the Commonwealth was unaware of any. In these circumstances, the only legally relevant basis for admission of the testimony had been foreclosed. (The defendant's conviction was reversed on a different ground. At any possible retrial, exclusion of "consciousness of guilt" evidence as a sanction for discovery violation would not logically occur, advance notice now being apparent.) ***Further appellate review has been allowed, 437 Mass. 1106 (2002).***

EVIDENCE, HEARSAY: SUBSTANTIVE USE OF TESTIMONY GIVEN AT "PRELIMINARY" PROBATION REVOCATION HEARING, RECANTED AT FINAL REVOCATION HEARING; PRIOR "REPORTED" (NOT "RECORDED") TESTIMONY

At the preliminary hearing on the revocation of the defendant's probation, his girlfriend testified that he had battered her. The girlfriend was questioned by the probation officer, and defense counsel cross-examined her. At the final hearing twenty-two days later, the girlfriend testified for the defense, asserting that, although there had been a verbal altercation, there had been no physical contact. The "preliminary" hearing version, of course, was what the girlfriend had said in her "original call to the probation department, " and the "final" hearing judge, in the Commonwealth's direct case, allowed into evidence the probation officer's "summary" of what the girlfriend's preliminary hearing testimony had been. (According to the Appeals Court, "prior reported testimony may be proved by means other than an official transcript of the earlier proceedings," though the qualifier is supposed to be a capacity "substantially to reproduce the material testimony.") *Commonwealth* v. *Janovich*, 55 Mass. App. Ct. 42, 45 (2002). The only fault found by the Appeals Court with this scenario was that the girlfriend's prior inconsistent statements should have been admitted only "de bene" in the Commonwealth's direct case, and admitted substantively only when the witness acknowledged having made the statements. "Based on all that she saw and heard in the proceeding before her, the judge was surely not compelled to reject the original incriminating testimony that the defendant assaulted [the girlfriend] and accept the new exculpatory version, especially where the judge had misgivings about the influences that had led to the recantation." *Id.* at 50.

EVIDENCE: EXPERT WITNESS'S RELIANCE UPON THE TESTING OF OTHER INDIVIDUALS; HEARSAY

When the Commonwealth introduced an expert witness to testify about DNA analysis,

that expert had performed none of the testing herself, and none of the actual examination of the physical evidence. Instead, she had relied upon out-of-court assertions of the analyst who had actually conducted the tests: she only "reviewed" the case file "very thoroughly" so that she understood the work that was done by someone else. On appeal of his home invasion, rape, and related convictions, the defendant argued that the testimony of the expert should have been excluded as inadmissible hearsay, but trial counsel had failed to object to the testimony on this basis. The Appeals Court held that the judge had not abused his discretion ("much less create[d] a substantial risk of a miscarriage of justice") "when he ruled that the expert could base her opinion on the testing that he found had been properly conducted u~der the rule stated in Department of Youth Services v. A Juvenile, 398 Mass. 516 (1986)." *Commonwealth* v. *Hill, 54* Mass. App. Ct. 690, 693 (2002).

In the course of the decision, the Court seemed to endorse the validity of an argument that such testimony would be excludable if it amounted only to "reading to the jury the content of a record." *Id.* at 696-697. See also *id.* at 700 (the expert "admittedly went beyond giving an opinion and provided a fairly detailed description of the facts and data underlying her opinion," but this was "cumulative of testimony [thereafter] offered by the defense expert"). On the other hand, it faulted as untimely made an argument that the prosecution expert's testimony should have been excluded because the facts and data underlying the opinion testimony may have been based on improperly or unreliably performed testing procedures: "[g]enerally, a challenge to the foundation of the expert's opinion must be made **before an expert testifies."** *Id.* at 697. That the defendant's expert testified at trial that "the STR testing had been contaminated and was, therefore, completely unreliable" was an inadequate substitute for proof elicited in a pretrial motion.

The opinion likewise suggested that the defendant's claim that he was not able to cross-examine the proffered prosecution expert effectively because of the witness's lack of personal knowledge of the actual testing procedure, and possibilities of contamination therein, was one which should have been substantiated in a motion for new trial. *Id.* at 699 n. 9. The Court also noted (in the underlying premise of the defendant's guilt, and thus no unfair "prejudice" to him from evidentiary errors) that the defense expert apparently uncovered no information supporting exclusion of "testing at the PM and DQA1 loci," and indeed that his own testing made him conclude that the defendant's "genetic profile, which matched the profile detected on DNA samples taken from the crime scene, occurs in the population with a frequency of one in 30,581." *Id* at 698. The practical upshot of this decision seems to be that the opponent of DNA evidence has the burden to establish that it is unreliable, reversing the expected burden allocation that the proponent of "expert" evidence establish its reliability.

EVIDENCE: PRIVILEGE; WAIVER

In the case of *Commonwealth v. Pelosi*, 55 Mass. App. Ct. 390 (2002), the defendant was convicted of raping his nine year old son and eight year old daughter. The allegations of abuse were first made to a therapist several weeks after the defendant and his wife separated. There was no physical evidence. A DSS "51B" was generated and turned over to the defendant. Other records of the children's counseling, which took place after the 51B was prepared, were sought and not disclosed. In denying the defendant's pre-trial discovery motion, the judge 'impliedly' found that the requested records were privileged. It was at this point that the majority and the dissent by Justice Brown diverged. Justice Brown noted that there was no proper initial determination as to whether the records were privileged as required by *Bishop,* and asserted that

the case should be remanded so that such a determination could be made. His dissent is worth reading. In all these cases where the defense is trying to discover records which might be privileged, the first question that has to be answered is whether the record is really privileged. If the motion judge finds that the records are privileged, then he must provide written findings explaining the type, nature, and basis of the privilege. Doing so makes everything that follows so much easier, whether it is the Bishop stage II determination or the appeal. In this case the motion judge's findings are fairly characterized as cryptic. She implied that a privilege exists (but cited the wrong privilege), and went on to consider relevance. The majority held that the motion judge's relevance determination was not an abuse of discretion and upheld the conviction. The defendant's petition for further appellate review is currently pending.

EXPERT WITNESSES FOR THE DEFENSE: CROSS-EXAMINATION, CLOSING ARGUMENT DISPARAGING

Remember how, in Commonwealth v. Shelley, , the SJC noted that, of course, expert witnesses are paid for their time and to imply that this makes them unbelievable is unfair and stupid? Well, that was another time. Now, at least in a particularly gruesome first degree murder prosecution, much worse has been not only tolerated, but endorsed as a fair practice. The defendant herself was undoubtedly indigent. The prosecutor apparently sought to establish the "bias" of the expert witness, a psychiatrist, called by the defendant, by asking in cross-examination who paid him for his services. While the SJC purported to agree with the prosecutor's closing argument claim that the witness's response was "coy," he had responded with the only correct answer: he was, undoubtedly, "paid" by a check from the Commonwealth of Massachusetts via procedures effectuating G.L. c. 261, §§27A-G, the indigent's 'court costs' provisions. The Court thus endorsed as "supported by the evidence" the prosecutor's closing argument claim that the witness's answer was "an attempt to exaggerate the independence of his judgment[.]" *Commonwealth* v. *Fernandes*, 436 Mass. 671, 675 (2002). The Court likewise found no fault with the prosecutor's failure to accord the witness the respect of his title, "Dr." (a psychiatrist, M.D.) and his sneering references to the witness as "that fiction novelist," because "[t]he evidence indicated that [he] was, in fact, a novelist [.]" *Id.* at 674.

Practice tip. Consider filing a motion in limine to bar cross-examination on the topic of who "paid" an indigent defendant's expert witness. It is not relevant. (This unfortunate opinion goes so far as to *praise* the trial judge for being "rightly concerned about the jury's hearing testimony that might suggest the defendant's indigence." *Id.* at 675 n. 4.) It is completely unremarkable, and should come as no surprise to either a prosecutor or a juror, that witnesses "retained" and thereafter called by a party are called because they support that party's position. Cf. Commonwealth v. Haraldstad, 16 Mass. App. Ct. 565, 574 (1983) ("Of course witnesses are prepared by competent lawyers, and to imply otherwise is shabby."); Commonwealth v. Fatalo, 345 Mass. 85, 87 n. 1 (1962), quoting L. Hand, J., in United States v. Matot, 146 F. 2d 197, 198 (2d Cir.) ("What else but 'self-serving' the testimony of an accused person on his direct examination is likely to be, we find it difficult to understand"). If the topic is nonetheless mined, the prosecutor should certainly be barred from disparaging the witness for his truthful answer to the question of what entity's name is on the check for his services.

EVIDENCE: RELEVANCE; DEMONSTRATION OF TELESCOPE USED BY COP

"[J]ust prior to the commencement of trial," the prosecutor asked that the first witness be allowed to set up his telescope for jurors' viewing pleasure. The witness was a police officer

who had set up his telescope on the fifth floor of a hotel parking garage to undertake surveillance of Boston's "theater district," a locale where he had been involved in "well over a thousand" arrests for sales of crack cocaine. Around midnight, he saw, he claimed, one Berger approach one Carrasquillo, who pointed to the defendant, who purportedly sat on a fence thirty feet away. Berger then purportedly approached the defendant, who spat something into his hand and conveyed it to Berger. Berger was arrested "moments after" this transaction, upon the telescope officer's radio communication to officers on the ground. The defendant was arrested "moments" after receiving the telescope guy's description of the seller. The defendant was entering a "7-Eleven" convenience store, and had a cell phone and $190 on his person. He gave a false name at booking. At trial, the defendant testified that he had sold no drugs to anyone that night and had been at a nightclub before entering the store to buy cigarettes. Berger testified also, saying that someone other than the defendant had sold him the cocaine. *Commonwealth* v. *Perryman*, 55 Mass. App. Ct. 187 (2002).

Defense counsel had objected when the prosecutor proposed introduction of the telescope demonstrations and viewings by jurors, noting specifically that lighting conditions at the courthouse during the daytime were not the same as those at midnight when the transaction occurred. She objected again as he set up the telescope, and objected a third time after the witness "acknowledged that the demonstration would involve [only] viewing a sign outside the courthouse, ... which was at most about two hundred feet away" (even as he claimed that there was "no real amount" of difference in the lighting conditions!!!). So guess what???? The Appeals Court actually asserted that defense counsel failed to preserve the issue for appeal!!!! How creative! How contemptible! The rationale for this abominable claim was that AFTER the jurors were allowed to trot up and use the telescope to view a sign in broad daylight, when defense counsel yet again objected, now for the fourth time, to the demonstration of the scope, she stated more fully what would have been obvious even to a moron from the get-go: "the scope was not going to be the same today as it was that night." In addition to the differences in lighting, there was a shorter distance involved in the demonstration (even as the telescope was purportedly at the same "magnification" level as on the night at issue), and differences in jurors' vision would affect their ability to perceive. The opinion sniffed that the defendant "[could] not try a case on one theory and then, having lost on that theory, argue before an appellate court about alleged issues which might have been, but were not, raised at trial." *Id.* at 192. As to the merits, the Court claimed that no case supported defense counsel's argument for exclusion; the opinion actually catalogued quite a few it said did not support her argument. Well, here are several which do (even if the Court purported to believe that cases about "views" were different, *id.* at 193-195 nn. 1-3), and we're certain that you could find more than a few others in any basic evidentiary treatise. (The topic is "relevance." The proponent of any evidence at trial is supposed to establish, at the threshold, that the proffered evidence is relevant, i.e., that it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, Proposed M.R.Evid. 401; relevant evidence is admissible, generally, & irrelevant evidence is NOT admissible, Proposed M.R.Evid. 402. That a particular juror, particularly given variations in visual acuity, could see with the telescope, through a courtroom window in broad daylight, a sign, had no tendency to make it more or less probable that the officer could see what he claimed to have seen in the middle of the night in an extremely dense area of Boston.) See Commonwealth v. Best, 50 Mass. App. Ct. 722 (2001) (no abuse of discretion in excluding 2 p.m. photos of area when what was at issue was an alleged 6 p.m. exchange of currency for

glassine bag in the same area); Everson v. Casualty Co. of America, 208 Mass. 214, 219-220 (1911) (general rule respecting the admission of photographs, plans and models = discretion of judge, who, in exercising such "discretion" must determine whether there is sufficient similarity between what is offered and the original which is the subject of inquiry to make it of any assistance to jurors); Commonwealth v. Lawson, 425 Mass. 528 (1997) (after Commonwealth witness testified to physical layout of a building rooftop, and defense investigator made videotape to introduce as impeachment, there was **no error in barring its admission because of failure to establish that it was a fair and accurate representation of premises at the relevant time**," i.e., about 18 months earlier); Welch v. Keene Corp., 31 Mass. App. Ct. 157 (1991) (video of experiments admissible within judge's discretion **so long as experimental conditions were substantially similar to conditions giving rise to litigation**).

This opinion is as offensive in another particular. To support the proposition that, even if admission of the demonstration was error, there was no 'substantial risk of a miscarriage of justice,' the author relies, with certainty, upon the capacity of the scope-using officer to have seen what he claimed to have seen and to have made a legitimate identification of the defendant as supplier of the drug. 55 Mass. App. Ct. at 197-198 n. 4. It should be clear that the point of a fair trial, conducted in accord with the rules of evidence, was to determine **whether or not the officer's assertions were credible.** The Commonwealth sought to bolster the credibility of those assertions by the irrelevant demonstration of the scope under optimal conditions, which did NOT attend the relevant viewing on the night at issue. When one assumes the truth of all prosecution testimony, there becomes a presumption of guilt so that no legal error can be found harmful.

EVIDENCE: RIGHT TO PRESENT; TELEPHONE ADMISSION, BY SOMEONE OTHER THAN DEFENDANT, RE: HOMICIDE; GRAND JURY TESTIMONY USED SUBSTANTIVELY

The prosecution claimed that the defendant and another repeatedly targeted retail jewelry stores for stealing jewelry and fencing it for cash. During one planned robbery, according to the prosecution, the defendant fatally shot a store employee who had seen the robbers on a video camera and was reaching for a weapon. *Commonwealth* v. *Sullivan*, 436 Mass. 799 (2002). But the defense had a different theory: the deceased, a married man, was having an affair with the former wife of one Sullo. Two days after the killing, a message was left on the answering machine of that former wife. The caller said, "Yeah, you know, you're a real asshole, going out with a married man, fucking him over. You're next on the list." The woman immediately called 911 and said that she thought the voice might have been Sullo's, an identification she repeated under oath to the grand jury. So convinced was she that a "panic button" was installed on her telephone by the domestic violence unit. The defense "intended to argue that the words, 'you're next' implied that [the store employee / lover] had been first; in other words, that Sullo in effect had admitted to the killing." *Id.* at 806. The trial judge, however, excluded the tape because the former wife, at a voir dire during trial, disavowed her earlier identification, saying that the voice was "absolutely not" that of Sullo.

THIS WAS ERROR. Neither the "tentative" nature of the earlier identification, nor the fact that it was now disavowed, barred its introduction. "An extrajudicial identification may be offered as substantive evidence even when the witness repudiates that identification at trial as long as there is no dispute that the prior identification in fact was made." *Id.* at 807. Furthermore, "**the recording was admissible regardless of whose voice it was simply because**

it suggests that someone — anyone — other than the defendant admitted to the killing, and provides a motive unrelated to the defendant." *Id.* Incredibly, after these crystal-clear realizations, the Court ruled that "failure to admit the tape did not prejudice the defendant." *Id.* Because the Court thought the evidence on the shooting to be "extremely strong," the right to a jury determination of guilt after the opportunity to introduce all favorable proofs to that jury was forfeited. While the opinion cited to the Commonwealth's evidence, which included testimony that the defendant made "admissions" by word or conduct, and testimony that he had cased the site earlier for a robbery, someone up there needs to be reminded that such evidence is not necessarily truthful, that witnesses can and do lie (this case featured, for instance, the old standby of a prison acquaintance claiming the defendant confessed to him), and that a FAIR trial is to come between the prosecution's allegations supporting conviction and life (or other) sentences to prison.

GRAND JURY: JURORS NEEDN'T HAVE HEARD THE EVIDENCE TO VOTE FOR INDICTMENT

Twenty-three persons comprise a grand jury. G.L. c.277, §§1, 2A-2G. Remember how the grand jury is supposed to be "a bulwark of individual liberty and a fundamental protection against despotism and persecution"??? Well, forget it. A defendant moved to discover grand jury attendance records to find out whether at least twelve of the grand jurors who voted to indict him (the concurrence of at least twelve jurors being necessary to indict an accused, see M.R.Crim.P. 5(e)) had heard "**all** of the evidence" presented against him; his indictment was voted upon after evidence was taken during portions of six days over a three month period. "Of particular concern to the defendant was whether fewer than the required minimum of twelve grand jurors voting to indict him had heard certain exculpatory evidence, including evidence suggesting that he had been erroneously identified." *Commonwealth* v. *Wilcox*, 437 Mass. 33 (2002). "Adoption of the rule the defendant proposes may cause the prosecution to seek to indict an accused on the basis of whatever evidence it can present in one day," *id.* at 38, and this would mean that the prosecution wouldn't perhaps be able to present "direct" testimony of several witnesses and would have to rely instead upon hearsay statements introduced via one witness (like this would be unusual?). While this latter manner of proceeding certainly wouldn't be "impermissible," the SJC has stated its "preference for the use of direct testimony before grand juries," which purportedly "inures to the accused's benefit." *Id*. (Sometimes it certainly does NOT, e.g., in those cases in which the witness does not offer during trial testimony favorable enough to the prosecution, and the prosecution is allowed to introduce substantively the more damning version trotted out for the grand jurors.)

GRAND JURY: SUFFICIENCY OF EVIDENCE

In *Commonwealth v. Brown*, 55 Mass.App.Ct. 440 (2002), discussed in CRIMES: PERJURY, the defendant filed a motion to dismiss pursuant to *Commonwealth v. McCarthy*. The defense conceded that one witness before the grand jury stated that Brown's boyfriend had shot him and that Brown had testified he had not. Obviously these versions could not be reconciled. The defense argued however, that to permit this indictment to stand would empower the prosecution to obtain a perjury indictment anytime there was a contradiction between the testimony of two witnesses. Although the Court did uphold the denial of the motion, the opinion seemed to recognize the logic of the defense argument, stating that it was not implausible to require some degree of corroboration of one version before an indictment could survive a *McCarthy* motion.

In this case, corroboration was furnished by the utter improbability of Brown's grand jury testimony together with a vast amount of contradictory extrinsic evidence.

IDENTIFICATION: ERROR IN ALLOWING HEARSAY TESTIMONY RE: EXTRA JUDICIAL IDENTIFICATION WHEN IDENTIFYING WITNESS NEITHER ACKNOWLEDGED THE IDENTIFICATION NOR EXPRESSLY STATED SHE HAD IDENTIFIED THE DEFENDANT

An elderly woman was raped in her apartment one morning. At trial, when asked to identify the man who had attacked her, she pointed to a man other than the defendant, but indicated that she was not certain. Perhaps quite consciously, therefore, the prosecutor did not ask her to identify the photograph which she had said, shortly after the crime, depicted her attacker. Instead, the prosecutor elicited from a police detective that the victim had selected the defendant's photograph, and that both the detective and the victim had initialed the photograph, which was then admitted into evidence. Defense counsel at trial failed to object to this testimony and exhibit. Appellate counsel, however, correctly and successfully argued that the testimony and exhibit were inadmissible under Commonwealth v. Daye, 393 Mass. *55,* 60-6 1 (1984), which holds that an extrajudicial identification is not admissible as substantive evidence when the identifying witness herself does not acknowledge at trial the precise out-of-court identification or state explicitly that on that prior occasion she identified the defendant. *Commonwealth* v. *Hill,* 54 Mass. App. Ct. 690, 691 (2002).

What trial counsel had focused upon, instead of the inadmissible identification of the defendant, was the prepared defense that the police had skewed the investigation to insure the erroneous identification of the defendant. On the day after the crime, the defendant had told a man that he had witnessed a crime in Chelsea and had tried to help a rape victim attacked by a "Dominican" male, but was now concerned about his own fingerprints being in her apartment. The man reported this conversation to police, who asked the defendant to come to the police station. There, at the behest of the police, the defendant selected a photograph of the man he said he had seen at the crime scene. The photograph closely resembled the composite drawing that the victim had helped create. According to police, however, the photo also bore a "remarkable resemblance" to the defendant himself. Trial defense counsel assailed the police failure to include the photo selected by the defendant in the array immediately thereafter shown the victim, and argued that the police wanted only evidence which would fit their already-set theory of the defendant's guilt. *Id.* at 692 n. 1. The police instead showed to the victim an array which included the photo of the defendant, and it was this photo, according to the police officer s inadmissible testimony, that the victim selected. The Appeals Court's opinion noted explicitly that the victim did testify that she had identified a single photo from the array shown to her, and that the jury heard also that the officer immediately arrested the defendant upon being informed what photo the victim had selected. *Id.* at *693* n. 2.

IDENTIFICATION: PHOTO ARRAY [IR]RELEVANT?

A juvenile was charged with having set upon and battered a teenaged victim as the latter was leaving a store with some ice cream. The juvenile was purportedly in the company of another male and a female known to the alleged victim. The juvenile himself was someone the alleged victim had known only as "Alan," from a school both had attended in the past. The fight broke up and the other individuals departed the scene just before, or as, the police arrived. The police drove the alleged victim around the neighborhood, but he identified no one until presented

with a six-person photo array at the police station, apparently on the same night. The juvenile was arrested thereafter. At trial, the juvenile presented witnesses who testified that the alleged victim had grabbed the female when she refused to talk with him, that the juvenile had heeded her cries for help, and that another juvenile had broken up the fight between the alleged victim and the accused before the police arrived. *Commonwealth* v. *Lamont L*, 54 Mass. App. Ct. 748 (2002).

Over the juvenile's objection, the Commonwealth was allowed to introduce evidence of the alleged victim's identification of the juvenile from the photo array shown him at the police station. On appeal, the juvenile argued this to have been error. With little insight, or credibility, the opinion asserted both that "the array was ... used as part of a **crucial pre-arrest identification procedure,**" *id.* at 752 (that it was "crucial" in the immediate aftermath of crime has absolutely nothing to do with its evidentiary admissibility at trial), and that "even though the juvenile was not contesting identity, the array was still 'relevant to explain "how the accusing finger came to be pointed at the defendant."'" *Id.* at 751. Here, as in other cases, "showing the complete picture" is no justification for introducing offending material, when the circumstances of an alleged crime are wholly intelligible without the objectionable material, even if it is only "potentially" prejudicial. See, e.g., Commonwealth v. Petrillo, 50 Mass. App. Ct. 104 (2000). See also Commonwealth v. Diaz, 426 Mass. 548 (1998) (error to admit hearsay testimony, despite judge's justification that it "show[ed] the general atmosphere of what was occurring": "there is no exception to the hearsay rule such as the court invoked"). The opinion claimed that there was no prejudice from introduction of the array, failing utterly to comprehend abundant caselaw noting that jurors KNOW that photos are possessed by police for mostly "bad conduct" reasons. See Commonwealth v. Barrett, 386 Mass. 649, 652 (1982) ("It is a matter of fairly common knowledge that the central photographic files maintained by police do not in general contain the likenesses of any save those who have had some contact with criminal law. [citation omitted]. Ordinarily, therefore, testimony about the process by which the [defendant's] photograph was selected should be excluded. [citation] The rule does not apply when the identity of the perpetrator is a central issue in the case, and the defendant attacks the procedures by which identification was made. Here, however, Barrett's identity was never at issue"). See also Commonwealth v. McCray, 40 Mass. App. Ct. 936 (1996) (witness had known defendant for several years, had been to his apartment, and had already told the police that the defendant committed crime; "No purpose was served by evidence of the photographic identification but to inform the jury that the police had the defendant's picture"). ***Practice tip.*** It is conceivable that, at the time the array was introduced in this case, the judge did not know that identification would not be contested later, during the defense case. Consider moving in limine, in advance of trial evidence, to bar mention of photo arrays. At the motion hearing, you can give specific notice that there will be no issue as to identification, and thus NO materiality in evidence that police had your client's photo to put in an array. Cite Barrett and McCray, above.

IDENTIFICATION: 'SOMEONE ELSE DID IT' DEFENSE

See ***EVIDENCE: RIGHT TO PRESENT; TELEPHONE ADMISSION, BY SOMEONE OTHER THAN DEFENDANT, RE: HOMICIDE; GRAND JURY TESTIMONY USED SUBSTANTIVELY***, summarizing *Commonwealth* v. *Sullivan*, 436 Mass. 799 (2002).

IMPOUNDMENT: APPELLATE REVIEW

At a murder trial, the judge "stated" that the names of certain prospective jurors questioned during individual voir dire in a closed court room would be removed from the trial

transcript for privacy reasons. The names were not removed in the transcript, however, which was eventually prepared for the defendant's appeal of his conviction. The defendant filed a motion for new trial and claimed that the trial judge's decision to close the court room during portions of the voir dire violated his right to a public trial, and this motion was denied. The Commonwealth then filed a motion requesting that the Appeals Court impound the names that had not been removed from the transcript; the prospective jurors, according to the Commonwealth, could rightly demand/expect that the judge's "promise" to them would be kept. An Appeals Court judge, after a hearing, issued an order to remove the names from the transcript. The defendant appealed this order to a panel of the Appeals Court, and requested that the matter be consolidated with his other pending appeals. He also filed a petition pursuant to G.L. c. 211, §3. A single justice of the SJC denied the petition on the ground that the issue was "fully reviewable under the regular appellate process." The full bench of the SJC thereafter held that the appropriate avenue of review was by appeal to a panel of the Appeals Court. *Jaynes* v. *Commonwealth*, 436 Mass. 1010 (2002).

For the Appeals Court's decision on this issue, see *Commonwealth* v. *Jaynes*, 55 Mass. App. Ct. 301, 313-314 (2002), summarized above at ***COURTROOM, CLOSURE OF: JURY IMPANELMENT, INDIVIDUAL VOIR DIRE, PRIVACY CONCERNS; IMPOUNDMENT OF TRANSCRIPT PORTIONS (NAMES OF SOME POTENTIAL JURORS).***

JOINDER OF CRIMES: NO ABUSE OF DISCRETION IN JOINING ROBBERIES AND BREAKING & ENTERING

An armed robbery of a jewelry store in Stoneham on June 16, a fatal shooting at a jewelry store in Waltham on July 5, and a burglary of a "wholesale" club in Medford on July 14, were the criminal episodes for which the defendant was tried and convicted. On appeal he argued that the cases should not have been joined for trial: he certainly would have had a better chance of acquittal if they had not been, since, for instance, there was support for the proposition that the homicide was committed by a romantic rival of the victim. The SJC took the opportunity to disavow the oft-cited Commonwealth v. Blow, 362 Mass. 196 (1972), which requires that joined offenses be provable "by evidence connected with a single line of conduct, and grow out of what is essentially one transaction." Reliance on that case "is misplaced," said the Court, because since it was decided, the Mass. Rules of Criminal Procedure have been adopted, and "criteria for joinder are now somewhat broader" under Rule 9. Separate "episodes" are permissibly joined now if they "are connected together [how???] or constitute parts of a single scheme or plan." *Commonwealth* v. *Sullivan*, 436 Mass. 799, 804 (2002). The crimes here were "connected," according to the Court, because in each episode the defendant and a particular accomplice acted together, in each they intended to or did steal a retail store's jewelry to "fence" it for cash, in each an accomplice was left in a getaway car, the crimes were purportedly "in the same general geographic region," and "in fairly close temporal proximity."

Given that the offenses could be found "properly joined" under the Rule, it was the defendant's burden to show, for relief, that he was "prejudiced by the joinder," such that severance should have been allowed under M.R. Crim. P. 9 (d). Evidence relating to the other crimes would have been admissible at a severed trial of a single criminal incident, for motive, intent, or identity. The defendant was virtually caught in the act, shortly after leaving the Medford wholesale club break-in, and in the car then were a notebook which came from a stolen car used in the Waltham shooting, large green trash bags like those used in the Stoneham robbery, and black leather gloves allegedly worn by the defendant when (during an apparently aborted robbery of the Waltham store) he "cased" the Waltham site.

JOINT VENTURE: SUFFICIENCY OF EVIDENCE; ROLE-DENOMINATION NOT NECESSARY

See *Commonwealth* v. *Ramirez*, 55 Mass. App. Ct. 224, 230 (2002), summarized at ***EVIDENCE, HEARSAY: BUSINESS CARDS NOT ADMISSIBLE TO ESTABLISH TRUTH OF MATTER ASSERTED THEREON; LIABILITY FAIR WHETHER DENOMINATED 'JOINT VENTURER' OR 'PRINCIPAL.'***

JUDICIAL MISCONDUCT: AVOIDANCE OF MANDATORY SENTENCE BY REDUCTION OF CHARGED OFFENSE VIA DEFENDANT'S GUILTY PLEA; SEPARATION OF P0WERS

The defendant was charged with driving under the influence, FOURTH OFFENSE, a crime which required imposition of a minimum of two years of imprisonment under G.L. c. 90, §24(1)(a)(1), 5th paragraph. Over the objection of the Commonwealth, a District Court judge allowed the defendant to plead guilty to driving under the influence, THIRD offense, and imposed a sentence of two years in the house of correction, six months to serve, balance suspended, with probation for two years. The judge "d[id] not possess authority unilaterally to reduce the level of charge brought by the prosecutor." *Commonwealth* v. *Rose,* 54 Mass. App. Ct. 919 (2002). The decision contrasted a situation in which a judge might legitimately exercise his/her discretion to dismiss or reduce a charge if the Commonwealth had been provided a full and fair opportunity to present its case, i.e., at trial. An example of such an instance is a trial judge's reduction of a jury verdict pursuant to M.R.Crim.P. 25 (b).

JURISDICTION, TERRITORIAL: CLAIMED UNCERTAINTY OF PLACE OF DEATH

On appeal, but not before, the defendant raised the issue of whether Massachusetts had territorial jurisdiction in a homicide prosecution, and argued specifically that the judge erred in failing to instruct the jury that the Commonwealth was required to prove beyond a reasonable doubt that criminal acts providing the Commonwealth with jurisdiction to prosecute the defendant for murder had occurred within Massachusetts. The Court held that the judge had no obligation to give such an instruction here, particularly where no such instruction was requested: "[a]lthough the Commonwealth did not offer evidence on the exact time or place of the child's murder, and his body was disposed of in ... Maine, after the defendant [and co-defendant] spent the night in New Hampshire, there was conclusive evidence of the kidnapping of the child in Middlesex County, and all of the circumstantial evidence [recounted in detail subsequently] pointed to Massachusetts as the site of the murder." *Commonwealth* v. *Jaynes*, 55 Mass. App. Ct. 301, 309 (2002). Furthermore, G.L. c. 277, §62 provides that Massachusetts has jurisdiction to prosecute a defendant for murder even if the death occurs outside the Commonwealth, if violence or injury leading to the death is begun in the Commonwealth. In previous cases, it has been held specifically that kidnapping, at least where accompanied by the binding of the victim and his forceful confinement, includes the requisite violence to the victim to confer jurisdiction on the Commonwealth under the statute. The circumstantial evidence in this case indicated such forcible confinement in Massachusetts.

JURORS: EXTRANEOUS INFLUENCE; ADEQUACY OF INQUIRY & REMEDIATION

Before court convened on the morning after the first day of testimony in a gang-related murder case, a juror reported to the judge that as she and several other jurors had left the

courthouse the preceding day, and were walking down the street, a car pulled up next to them, a car containing "two Spanish boys stopped very quickly, pulled up to the side of us and made some comments none of us could understand" before making a U-turn in the road. The juror reported that "we were a little concerned." *Commonwealth* v. *Correa*, 437 Mass. 197, 199-200 (2002). Although the judge inquired of each of the jurors regarding the incident, she dismissed only the juror who had reported it, and denied the defendant's motion for a mistrial. The Court preferred to treat the procedure as one involving findings of fact (of jurors' "indifference") by the trial judge, and eschewed the defendant's contrary claim that the jurors involved "clearly saw the incident as threatening" and communicated this fear to nearly the entire jury.

JURY DELIBERATIONS: DEADLOCK; JUDGE'S INVITATION TO JURORS TO REQUEST FURTHER ARGUMENTS BY COUNSEL!

The prosecution's evidence was that an undercover state trooper made a drug buy via one unaware Daley, who contacted his supplier on the trooper's cell phone, and that in response to such contacts, the defendant drove up, Daley got into the defendant's car, and Daley next emerged with drugs, which he conveyed to the trooper. Though the defense acknowledged that the defendant had been the driver, it was argued that there was no proof that he had supplied the drugs to Daley or taken money from Daley while they were in the car together, i.e., Daley was the lone seller. The jury deliberated for about eight hours over the course of two days before sending a note to the judge indicating its inability to arrive at a unanimous decision. In response to this note, the judge delivered a "Tuey-Rodriquez" instruction, and the jury deliberated another hour before the day's adjournment.

The following morning, before the jury resumed deliberations, the judge proposed to counsel that he would ask the jury to "isolate and list the factual issues on which they were divided and give the attorneys the opportunity to argue to the jury on those issues." The attorneys did not want this to occur, and the prosecutor threatened to seek emergency relief pursuant to G.L. c.211, §3. Nonetheless, the judge proceeded to broach the suggested procedure to the jurors as they convened for the day; he did include the admonition that he was not "ordering" them to send him such a communication as he had described, and said that it "would be completely up to the jury." The prosecutor was absent from the courtroom, as she was making good on her threat, and obtaining an order from the single justice that the judge was NOT TO PROCEED IN THE MANNER OUTLINED BY HIM TO COUNSEL, but instead to have deliberations proceed in the usual manner, subject to appropriate questions that might be asked "and the usual instructions concerning deadlock, if such instructions are timely and otherwise proper." *Commonwealth* v. *Gomez*, 55 Mass. App. Ct. 247, 251 (2002). Because the jury reached its verdict without taking up the judge's suggested procedure, the Appeals Court believed that it was "not faced with deciding whether it would have been reversible error had the jury actually identified disputed factual issues for purposes of reargument." *Id.* at 253. The Court found no indication that the jury's verdict was here "coerced." Although the jurors conveyed one question after the judge's novel suggestion, it was merely one asking what to do if one or more jurors did not "place significant value on testimony offered by police officers." The judge had responded to this in writing, with counsel's assent, that questions of witness credibility were solely up to the jury. A concurring opinion "underscore[d] how perilous it can be to proceed, particularly in a criminal trial, with such experimental techniques, absent some demonstrated need and over the objection of counsel." *Id.* at 254 (Lenk, J.).

JURY IMPANELMENT: 'EXTRANEOUS' INFLUENCE OF RELATIVES WHO ARE LAW ENFORCEMENT OFFICERS

The defendant was charged with firing shots at a police officer as he tried to evade arrest upon being observed attempting to break into a car. During jury impanelment, defense counsel asked the trial judge to conduct individual voir dire of two jurors who had siblings who were, respectively, an assistant district attorney and a state trooper; the judge refused to do so. The potential jurors had not responded to the "collective" questions of whether they would weigh the testimony of a police officer differently from that of a civilian simply because the person was a police officer and whether they could be fair and impartial, after receiving advice that the case dealt with an alleged assault with intent to murder a police officer.

The Appeals Court found no error, saying that the defendant had failed to meet his burden of demonstrating a substantial risk of extraneous influence, "speculation about " the possible bias engendered by the familial relationships being insufficient. Nonetheless, the Court "observed" that "the judge would have been 'prudent' to have conducted the follow-up questioning requested in this case." *Commonwealth* v. *Gittens*, 55 Mass. App. Ct. 148, 152 (2002).

JURY IMPANELMENT: RACE NEUTRAL PEREMPTORY CHALLENGES

In *Commonwealth v. Maldonado*, 55 Mass. App. Ct. 450 (2002), the defendant's conviction was reversed when the Court concluded that the reasons for peremptory challenges advanced by the prosecution (and accepted by the trial court) were not race neutral. The prosecution had used one peremptory to bounce a Superior Court Judge who is black. The Commonwealth then used its final peremptory to bounce another black prospective juror. The result was that the prosecutor bounced the only two black persons on the jury. When questioned by the trial judge for the reasons underlying the exercise of the second challenge, the prosecutor stated that it was because the juror didn't have children and had been single all his life. He followed up this chestnut by stating that the real problem was that he didn't have any young children. (The complaint was for possession of a firearm.) The problem for the prosecutor was that he had already passed on numerous white jurors who were single and/or didn't have any young children. The Court concluded that the prosecutor's reasons were not race neutral and reversed the conviction.

PRACTICE TIP: When this happens at trial, and the trial judge requests the reasons underlying the prosecution's suspicious peremptory challenges, the judge is supposed to make an explicit finding that the proffered reasons are bona fide and explain the basis for the finding. Failing to hold the trial judge to this protocol allows the appellate court to make its own determination whether the prosecutor's reasons are race neutral.

JURY INSTRUCTIONS: CHARGE CONFERENCE, JUDGE'S CHANGE OF MIND FOLLOWING CLOSING ARGUMENT; INVOLUNTARY MANSLAUGHTER; MALICE ALWAYS? INFERABLE FROM USE OF DANGEROUS WEAPON

The defendant was convicted of first degree murder, based on evidence that he and several other individuals had sprayed a parked car with gunfire and (according to the immunized witness who had driven the group to the scene) had gone to the scene with guns with the expressed intention of killing the victim and three other named individuals. Defense counsel had requested that the jury be instructed on involuntary manslaughter, a request that was rather summarily denied during the charge conference. Counsel nonetheless devoted his closing

argument to his theory of the case, a theory which would warrant only such a lesser verdict, i.e., that the shooters would not have been aware that anyone was actually inside the car, given that its two occupants were in the front seat with the seats in a completely reclining position, that the engine, radio, wipers, and lights of the automobile were all off, and that it was 2 a.m. on a very foggy night. After the argument, the trial judge at sidebar reversed his earlier refusal to instruct on involuntary manslaughter. Counsel "made a perfunctory request for a mistrial," stating that it was "to protect the record" and offering that he was "thrown off to some degree" in his closing argument by the judge's stated refusal to charge the jury as requested. He was offered, and accepted, the opportunity to argue again. *Commonwealth* v. *Dyous*, 436 Mass. 719, 730, 732 (2002). Appellate counsel nonetheless argued that the defendant was entitled to reversal of his first degree murder conviction based upon the judge's stated position at the charge conference.

The argument went nowhere. Not only did trial counsel get the requested instruction AND a second bite at closing argument, the Supreme Judicial Court held that the judge was right the first time: the defense had not been entitled to the requested instruction, because "there was no evidence that [the shooters] discharged their weapons believing no one was in the automobile." *Id.* at 731. The shooters focused their fire on where the victim was sitting, ten shots hitting the windows next to the victim, four of them hitting the victim. According to the immunized witness, the defendant had remarked after the fact, "We had to get him, because we all shot."

Another point briefly considered in this opinion was the rejection of defense counsel's request for an instruction that "malice can be inferred from the use of a dangerous weapon only if the weapon is used against a person." This issue met a similar fate, flatly dismissed because "there was no question that the victim died because dangerous weapons were used against him." *Id.* at 735. In a different case, this is an instruction extremely worthy of requesting, altered perhaps to be "malice can be inferred from the use of a dangerous weapon only if the actor is aware that he is using it against A PERSON [rather than an inanimate object]."

JURY INSTRUCTIONS: MANSLAUGHTER; ERRONEOUS BURDEN ON EXCESSIVE FORCE IN SELF DEFENSE & PROVOCATION

In 1998 and thereafter, appellate courts have reversed convictions based upon error in pattern instructions on manslaughter: the erroneous instructions have allotted to the Commonwealth the burden of proving beyond a reasonable doubt that the defendant injured the victim 'as a result of sudden combat or in the heat of passion, or by using excessive force as in self-defense,' and that, to prove voluntary manslaughter, the Commonwealth must establish beyond a reasonable doubt that the circumstances attending the killing were caused by an adequate provocation by the deceased or by an act of sudden combat against the defendant, and that the defendant under the influence of passion/anger/ fear killed the victim. The correct rule is that where evidence raises the possibility that the defendant acted on reasonable provocation, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act on reasonable provocation. The defendant in *Commonwealth* v. *Montanez*, 55 Mass. App. Ct. 132 (2002), obtained a new trial based on these flawed instructions, after the Appeals Court found a substantial risk of a miscarriage of justice (no objection to the instructions was lodged at the trial). The defendant was aware that a leader of the Latin Kings gang had beaten up his brother earlier that evening, and had vowed to kill the brother "today." The defendant had stabbed that assailant when he had sought out the brother a second time at midnight on this day and come at him with a baseball bat, reaching into his pocket during the altercation. The defendant had been

convicted of second degree murder, but the Court was "left with uncertainty that the defendant's guilty has been fairly adjudicated." *Id.* at 137. The erroneous instruction was articulated four times.

JURY INSTRUCTIONS: MISSING WITNESS

In *Commonwealth v. Joyner,* 55 Mass. App. Ct. 412 (2002), discussed in EVIDENCE: HEARSAY: SPONTANEOUS UTTERANCES: MOTIVE TO LIE, the defense requested a missing witness instruction when the out-of-court declarants failed to appear for trial. The trial court refused to give this instruction to the jury, and the Appeals Court found no abuse of discretion. The "missing witness" instruction may be given when a party has knowledge of a person, who can be located and brought forward, who is friendly to or at least not hostilely disposed toward the party, and who can be expected to give testimony of distinct importance to the case, and without explanation is not called. In such circumstances, the jury may infer that that person, had he been called, would have given testimony unfavorable to the party. In this case, the Court cited the representations made by the prosecutor to the trial court that the Commonwealth was unable locate the witness. Commonwealth efforts consisted of issuing subpoenas, making phone calls, speaking to someone in the household of the witness and sending a cruiser to the city of Lynn to locate the witness. The Court was satisfied that the foundational requirement of availability was lacking.

JURY INSTRUCTIONS: RAPE: DEFENDANT'S REASONABLE BUT MISTAKEN BELIEF THAT COMPLAINANT CONSENTED TO ACT

Commonwealth v. Vasquez, 55 Mass. App. Ct. 523 (2002), also discussed in SPEEDY TRIAL, was tried before the SJC's opinion in *Commonwealth v. Lopez*, 433 Mass. 722 (2001), which rejected the proposition that a reasonable but mistaken belief that the complainant consented to the intercourse was a defense to an allegation of rape. The Court adhered to this ruling. The elements necessary for rape do not require that the defendant intend the intercourse be without consent. The defendant's conviction was affirmed.

PLEA AGREEMENT, ENFORCEMENT OF: NECESSITY OF PROVING THAT THE PROSECUTION ENTERED BINDING AGREEMENT

The defendant was convicted of obtaining cable television service by fraud, and his conviction was reversed due to error in denying his pretrial motion to suppress specified evidence. His appeal also argued, however, that his motion in the trial court to enforce a plea agreement should have been allowed. The Court held that the defendant failed to establish that there was any binding plea agreement with the prosecutor. He had proffered only "a letter from defense counsel to the cable company for proof of such an agreement." *Commonwealth* v. *Allen*, 54 Mass. App. Ct. 719, 722 (2002). (Without any further detail provided in the opinion, a reader surmises that this letter asserted counsel's belief that the criminal prosecution would be aborted upon appropriate restitution to the cable company, and set forth the appropriate monetary amount for such settlement.)

POST-CONVICTION PRACTICE: SJC "GATEKEEPER" FUNCTION DOESN'T APPLY TO APPEALS FROM DENIAL OF MOTION FOR NEW TRIAL AFTER GUILTY PLEA TO FIRST-DEGREE MURDER; APPEALS COURT HAS JURISDICTION

In 1965, the defendant pled guilty to two indictments charging first degree murder.

Thereafter, he unsuccessfully moved to withdraw the guilty pleas as based on coercion, and unsuccessfully petitioned for habeas corpus relief. The case came before the SJC on a second motion to withdraw the guilty pleas, in which the defendant argued, again, that he had been coerced into pleading guilty due to a conflict of interest on the part of his plea counsel, and that his subsequent attorney had provided ineffective assistance in not making this claim better, or under the rubric of "ineffective assistance of counsel." *Commonwealth* v. *Balliro*, 437 Mass. 163, 169 (2002). The defendant received no relief. The Court did take the opportunity to hold that a defendant may appeal freely, without being required to obtain permission from the SJC in a "gatekeeper" role (G.L. c. 278, §33E), from the denial of a motion for new trial in a first degree murder case if the conviction occurred by guilty plea rather than trial. *Id.* at 164 (citation omitted). There is no right of direct review, however, to the Supreme Judicial Court; instead, the Appeals Court is the place for docketing appeals from denials of motions for new trial after guilty pleas to first degree murder. *Id.* at 164-165.

POST-CONVICTION PRACTICE: RULE 25(b)(2) ORDER OF NEW TRIAL BY TRIAL JUDGE; DEFERENTIAL STANDARD OF REVIEW ON APPEAL

Eight individually wrapped packets of cocaine, totaling less than sixteen grams of cocaine, were the basis of the defendant's convictions of possession with intent to distribute (second or subsequent offense) and possession of the same cocaine with the intent to distribute in a school zone. Two inositol tablet bottles, cut pieces of plastic wrap and uniformly-sized small pieces of aluminum foil, plastic bags, and two scales rounded out the proof. Three issues in combination led the trial judge to act favorably upon the defendant's motion pursuant to Rule 25(b)(2), and order a new trial; she declined, however, the defendant's primary invitation, i.e., to reduce the verdict to simple possession. The Commonwealth's appeal was fruitless: the decision was rightly that of the trial judge, and the Appeals Court "[w]ould not undertake to substitute [its] judgment for [hers]." *Commonwealth* v. *Marchese*, 54 Mass. App. Ct. 916, 917 (2002) (citation omitted).

The grounds for relief were: (1) admission of the investigating officer's opinion that the amount of cocaine seized was "inconsistent with personal use" (though the judge instructed the jurors that they were free to either or accept or reject this opinion), (2) the prosecutor's repeated assertion in closing argument that, despite defense counsel's own words to this effect in closing, there had been no **evidence** that the defendant himself ever used cocaine (suggesting the defendant had failed in a burden of producing such evidence), and (3) the jury's successful efforts during deliberations to defeat the "sanitizing" of an exhibit (a laboratory tag affixed to a scale asserted "scale with cocaine residue," and this tag was covered completely with two blank labels; the laboratory bag containing the scale and the sanitized label was sealed, and it was placed inside a second clear bag which was securely closed by stapling). The jury probably inferred from the tag that there was physical proof that the defendant used the scale to weigh cocaine, bolstering the prosecution's contention of distributive intent.

POST-CONVICTION PRACTICE: WAIVER OF ISSUE

In *Commonwealth v. Valliere*, 437 Mass. 366 (2002), the SJC reversed an order of the Superior Court allowing the defendant's third post conviction motion to correct his sentence. The motion judge had vacated the defendant's convictions and sentences for armed robbery and dismissed those indictments as duplicative of the defendant's conviction for murder in the first degree. (Felony murder had been one of two theories advanced by the prosecution at trial and it

was impossible to determine whether that had been the basis for the jury's verdict.) In reversing the motion judge the Court held that the defendant had waived the issue raised in his motion by not raising it in his second post conviction appeal motion which had been denied in 1994. The theory on which Valliere's most recent motion was based, i.e. that whenever a jury might have reached a verdict of murder on the basis of a felony murder theory, a concurrent sentence for the underlying felony is duplicative, was sufficiently developed in 1994 such that his failure to raise it at that time constituted a waiver.

PRACTICE TIP: It is difficult to reconcile this case with *Commonwealth v. Watson,* 409 Mass. 110 (1990), which suggests that the motion judge may consider a previously waived issue in a second Rule 30 motion and thereby resurrect it. The judge certainly considered Mr. Valliere's issue. He allowed the motion and granted the requested relief by vacating the defendant's convictions for armed robbery and dismissing the indictments as merged with his convictions for murder in the first degree. In the event that a defendant is seeking relief based on a previously waived issue it is probably worth bringing this fact to the motion judge's attention so that the order can indicate that the motion judge is acting to prevent a 'manifest injustice' in complete awareness of the waiver issue, and citing the *Watson* case.

PRACTICE: POST-CONVICITON; MOTION TO WITHDRAW PLEA

Commonwealth v. Colon, 55 Mass. App. Ct. 903 (2002), was a case where the defendant was attempting to withdraw a guilty plea from 1994. There was no record of the actual plea, so the defense obtained copies of seven tape-recorded plea colloquies by the same judge with other defendants from the same time period as the subject plea. All were constitutionally deficient. The prosecution countered with testimony from a local attorney who purported to testify from his memory that the colloquies given by the plea judge seven years earlier were fine, although he was unable to recite the colloquies from memory or cite a case where such a colloquy took place. The Commonwealth also introduced an affidavit from the plea judge. Amazingly, the affidavit by the plea judge contained a recitation of his usual practice at the time, which was also insufficient! The motion judge credited the affidavit without ever allowing the defendant to cross-examine the plea judge. The Appeals Court framed the issue as a credibility determination which, of course, is within the purview of the motion judge. Given the fact that she 'credited the affidavit' in her findings, a real problem has arisen. If you 'credit' evidence that establishes a constitutionally defective plea colloquy, how can you say the colloquy was sufficient? The Appeals Court upheld the denial of the motion to withdraw the guilty plea, but stay tuned. Further appellate review has been granted, 437 Mass. 1110.

PROBATION SURRENDERS: PERMISSIBLE TERMS OF PROBATION; RELINQUISHING DRIVERS LICENSE

In *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514 (2002), the defendant was convicted of leaving the scene of an accident after causing personal injury and driving recklessly or negligently so as to endanger. As part of the defendant' s sentence, she was placed on probation with a condition being that she surrender her license and not apply for a new one during the term of her probation. The defendant argued that the Registrar of Motor Vehicles had the exclusive authority to revoke a license and that the probationary term amounted to such a revocation. The Court held that the statute did not invest the Registrar with the exclusive authority to revoke a driver's license and that such authority was within the judge's 'wide latitude' in imposing conditions of probation.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT URGING CONVICTION OF INDECENT ASSAULT AND BATTERY BECAUSE OF DEFENDANT'S "CHARACTER" AS A PURPORTED CRACK COCAINE DEALER, SUBSTANCE ABUSER, & THIEF; 'CONSCIOUSNESS OF GUILT' ARGUMENT EXPLICITLY BARRED BY JUDGE AS SANCTION FOR DISCOVERY VIOLATION; MISSTATEMENT OF EVIDENCE

A woman testified that the defendant grabbed her as she was leaving her apartment, gripped her face in his hands, and attempted to "stick his tongue into her mouth, but she clenched her teeth," so that this was not possible. Earlier in the day, she had given him a cigarette and "exchanged pleasantries with him." The defendant testified that he had had friendly conversation with the woman twice, earlier on this day, and that when he approached her at the time in question, he had told her it was his birthday, to which she responded by hugging him. *Commonwealth* v. *Daley*, 55 Mass. App. Ct. 88, further appellate review allowed, 437 Mass. 1106 (2002). The defendant also testified, during his direct examination, that he had attempted to get something to eat when he arrived at a Salvation Army shelter at about 7:00 p.m., and had grabbed and knife and fork with that intent, but was told instead that he had arrived too late to get a bed for the night and had to leave immediately. He further acknowledged a prior conviction for cocaine distribution.

The Appeals Court reversed the defendant's conviction because of the prosecutor's misconduct in closing argument. She misstated the evidence by asserting that the defendant acknowledged "stealing" the knife he had instead said that he merely intended to use for eating; she repeatedly asked the jury to consider his "character," i.e., he was a "crack dealer" and "a thief" and a drug and alcohol user; and she argued that he had exhibited consciousness of guilt because he had been observed "crouching" by a Coca-Cola machine. The trial judge had ordered the prosecutor to refrain from making any argument as to purported "consciousness of guilt," because in response to a discovery request, she had stated that the Commonwealth was unaware of any evidence of consciousness of guilt (though thereafter proceeded to elicit testimony regarding purported "crouching" or "hiding"). Furthermore, even had there been no sanctioning order, the evidence which formed the basis for the inference was "thin," and the jurors were not instructed on the subject. The only attempt to "cure" the prosecutor's transgressions was an instruction concerning the improper use of the defendant's prior cocaine conviction.

PROSECUTORIAL MISCONDUCT: DIRECT EXAMINATION SEEDING BURDEN ON DEFENSE TO INTRODUCE CONTRARY EXPERT EVIDENCE

During direct-examination of the scientist providing testimony about DNA testing (the likelihood that the donor of sperm on the victim's vaginal swabs was a Caucasian other than the defendant was one in fifty-seven trillion), the prosecutor asked whether additional testing had been performed on the portion of underwear sample preserved for inspection by the defense. An objection and motion for mistrial followed, given that the prosecutor was improperly suggesting to the jury that the defense was obliged to present favorable evidence as to this sample if such evidence existed. The objection was sustained, but the mistrial motion was denied. According to the Appeals Court's opinion, the prosecutor at sidebar "gave a good faith reason for asking the question." What that reason was is hard to imagine. The Court claimed that any prejudice was cured by a prompt instruction that there was no obligation on the part of the defendant to establish innocence or to present evidence "and that any suggestion implicit in the prosecutor's last question was improper." *Commonwealth* v. *Girouard*, 436 Mass. 657, 668-669 (2002).

It seems rather obvious that this "curative" instruction would have served to implant firmly in the jurors' minds exactly the point that they were not to be thinking about. See, e.g., Commonwealth v. Flebotte, 34 Mass. App.Ct. 676, 680 (1993), S.C. 417 M 348 (1994) (**"asking the jury to disregard** [specified testimony] may be **tantamount to asking the jury to ignore that an elephant has walked through the jury box");** Commonwealth v. Martin, 424 Mass. 301 (1997) (attempted curative/limiting instruction **may have effect of "children, don't put beans up your nose" admonition).** ***Practice tip.*** Consider filing, in advance of trial, a motion in limine concerning such constitutionally-barred inferences. Demand, in advance, notice from the prosecutor as to any such suggestions s/he intends to plant (including, but not limited to, the better-understood actual "missing witness" variety), and hash out in a voir dire before the fact why they are impermissible. Have handy the 'elephant in the room'/ 'beans up the nose' citations.

PROSECUTORIAL MISCONDUCT: IMMUNITY OF A WITNESS; OPENING STATEMENT, EXAMINATION, CLOSING ARGUMENT

The man who drove assailants to the site where they sprayed a parked car with gunfire and killed one of its occupants was granted immunity from prosecution. He was the prosecution's star witness during first degree murder trials. The prosecutor's opening statement asserted that the witness had been granted immunity by the Supreme Judicial Court. On redirect examination of the immunized witness, he elicited that immunity meant that the witness could "tell the truth without being prosecuted," and that during the immunity hearing he was told that "he could be prosecuted for perjury or contempt of court if he did not tell the truth." The prosecutor's closing argument described immunity as "a license to tell the truth." The judge's instructions to the jury on the topic of the credibility of an immunized witness referred solely to the irrelevant legal requirement set forth in G.L. c. 233, §20I, requiring for conviction "some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant." The instruction given the jury here, however, asserted that such "corroboration" served to "ensure ... the credibility of testimony given by an immunized witness." [Here, the fact that a person had died by gunfire would quite obviously suffice.] No mention *at all* was made of the indisputable fact that neither a prosecutor nor a judge knows whether a witness is telling "the truth," and there was *no* directive *at all* which would require jurors to appraise immunized testimony with "special care," which was the central observation in the case of Commonwealth v. Ciampa, 406 Mass. 257 (1989), concerning a witness who has received merely (in contrast) a beneficial plea bargain (**"the judge must specifically and forcefully tell the jury to study the witness's credibility with particular care";** while no "particular words" were prescribed, "We do expect ... that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth").

Incredibly, the Court was in a major huff *only* because it hadn't wanted ITSELF used as a voucher, which the prosecutor did both in closing and in invoking the name of a particular justice during redirect examination of the witness. "We now make clear that henceforth a prosecutor may not specify that a grant of immunity has been made by a particular judge, or in a particular court. The source of a grant of immunity is not relevant, and the potential to mislead the jury is significant. The prosecutor may elicit only that the witness has been granted immunity, and the sanctions that may flow if the witness does not tell the truth. That is all." *Commonwealth* v. *Dyous*, 436 Mass. 719, 727 (2002). The opinion claimed that the [nonexistent] instructions

"were sufficient to offset any possibility that the jury may have perceived [the witness's] credibility to be enhanced." *Id.* at 726.

PROSECUTORIAL MISCONDUCT: QUESTIONS ASKED WITHOUT GOOD FAITH BASIS, INTRODUCING HEARSAY AND INCOMPETENT "MOTIVE" EVIDENCE

It is error for a prosecutor to communicate impressions through leading questions with no demonstrated evidentiary basis, crafted to evoke negative answers and leave nothing more than unsubstantiated innuendo. In *Commonwealth* v. *Wynter*, 55 Mass. App. Ct. 337 (2002), the defendant was charged with possession of a firearm and ammunition and of discharging the firearm near a dwelling. He was found in the apartment into which the shooter had run, and was identified by a witness as the shooter. At trial, however, he testified that he had been asleep in the apartment and, after hearing shots, had opened the door to one "Patrick," who was the boyfriend of a resident of the apartment. He had not responded to later to knocks, and indeed had locked himself into a bedroom, because he feared that some shooter was trying to come after "Patrick," who had fled by the time of the knocks.

The prosecutor's cross-examination of the defendant proceeded to ask him if he were "aware" that, earlier in the day, the brother of a named friend of the defendant had been the victim of a robbery and beating by persons who lived in the building toward which the shots had been fired. "No," was the answer, repeatedly, during a series of three more identical questions. "No," was also the answer to the prosecutor's "questions" seeking agreement that the defendant had a conversation with his friend about the brother's condition, that the defendant accompanied persons going to the hospital to see if the brother "was okay," and that the defendant and three others had gone down to Mattapan that night, that a named individual was driving and that the defendant was sitting in the front passenger seat ("I have no idea what you're talking about, sir"). This "was the essence of improper interrogation." *Id.* at 341. The questions themselves made it "extremely unlikely that the prosecutor ... expected an affirmative answer," and he should have been required to have admissible proof in the event the witness did not acquiesce in the prosecutor's suggestions. The insinuated basis for the questions was made known later, in a "tag-along final question" that was equally improper, i.e., "You are aware that [named woman] gave a statement in this case? You are aware of that?" *Id.* at 342. Two federal cases were cited to good effect, and it was noted that they had been cited previously, **and approved,** by the SJC: U.S. v. Hall, 989 F.2d 711, 716-717 (4th Cir. 1993) (it is improper "under the guise of 'artful cross-examination' to **tell the jury the substance of inadmissible evidence**"); U.S. v. Sanchez, 176 F.3d 1214, 1221-1222 (9th Cir. 1999) (reversing conviction because prosecutor cross-examined defendant **about inadmissible statements**).

SEARCH AND SEIZURE: COMPUTER FILES (PORNOGRAPHY); SCOPE OF PERMISSIBLE SEARCH

In the aftermath of two homicides, police came to believe that they were motivated by a family dispute involving the sale of particular property in Cambridge where the murder defendant resided. Police obtained a search warrant to seize the murder defendant's computer at that address, to examine any electronic mail, as well as other documents related to this "family dispute." To gain entry to the particular property, police went to adjacent property, where other family members (i.e., the murder defendant's mother, and his brother and the brother's two sons) resided. One of the murder defendant's nephews let the officers into the murder defendant's residence, and officer's "secured" the targeted computer. The expert officers, however,

discovered a particular cabling wire plugged into a network interface card on the subject computer. The nephew, Thomas, himself extremely experienced and employed in the computer field, told the officers that the wire led from that computer to a "hub" connected to his own and his brother Charles's computers at the adjacent address. Charles had set up the network linking the computers, and became the defendant in this reported case involving possession of child pornography. He was at work at the time of the searches at issue. *Commonwealth* v. *Hinds*, 437 Mass. 54 (2002).

The brother on scene, Thomas, gave his permission for the police to search for electronic mail evidence pertaining to the homicide, and, at the request of the police, contacted Charles to request similar permission. Charles said he didn't want the police looking at his computer until he returned home. Police proceeded to examine Thomas's computer, but he had "activated the network 'hub'" on his own, without police request, and this apparently enabled them to take note of a directory entitled, "Chuck." Thomas indicated that this directory signified Charles's network hard drive; police asked him for permission to search, via Thomas's computer, Charles's network hard drive. He responded by contacting Charles again. Police told Charles via telephone that they wanted permission to search his computer for electronic mail, and he asked "is that all you're looking for?" When told yes, he gave permission for the officer to go ahead but ONLY TO LOOK FOR ELECTRONIC MAIL, and said that he would be home in half an hour. The officer proceeded to access Charles's directory via Thomas's computer, and scrolled through looking for electronic mail files. During this scrolling, he noted "numerous file names with the extension 'JPG,' which indicated that the files contained graphic images." He noted further that many of these file titles were "sexually explicit," and some indicated that children were possibly the subjects. One particular file entitled "2BOYS.JPG" was the subject of a previous case which the officer had investigated. He knew it to be the title of a specific child pornography image, and opened the file to confirm his belief. When the defendant arrived, he was told that the search had already revealed child pornography. Further search pursuant to warrant turned up "thousands of images of child pornography stored on the defendant's computer." *Id.* at 57.

There would be no suppression. The officer "was not obligated to disregard files listed in plain view on the 'Chuck' directory whose titles suggested contents that were contraband." *Id.* at 61. The Court disagreed with the defendant's contention that the titles to the documents did not create probable cause to believe that their contents contained illegal subject matter. *Id.* The Court further upheld seizure of the defendant's hard drive and keyboard prior to obtaining a warrant, to prevent deletion of the computer data before the warrant could be obtained. No files other than the "2BOYS.JPG" were searched until a warrant was secured. *Id.* at 62.

SEARCH AND SEIZURE: "EMERGENCY" EXCEPTION TO WARRANTLESS ENTRY OF HOME; CONSENT AS FRUIT OF PRIOR ILLEGALITY

A police officer was told by a cable television company that at a particular apartment, the previously disconnected cable had been connected without the cable company doing the connection. The officer went to the apartment; its door was, purportedly, open, and loud music came from within. There was no response to the officer's knocking and "yelling" for the defendant and his wife. Sitting in a chair inside, the officer saw, however, a disabled man whom he knew to be "incapable of caring for himself." Purportedly concerned that the man might have been left alone in the apartment, the officer entered and spoke with the man, and noted that "cable t.v. was on." The defendant came running to the apartment yelling at the officer about his

entry into the apartment. The officer told the defendant of his concern for the disabled man and said that he had come about a cable complaint. In denying the defendant's motion to suppress, the trial court judge "found" that the defendant then "voluntarily and freely" had the officer step back into the apartment, and answered questions about his cable service; the officer saw a "coaxial cable" attached to the television. The judge ruled that the officer's initial entry was justified by his concern for the safety of the disabled person, i.e., an "emergency" exception to the warrant requirement properly invoked "when there is an immediate need for assistance for the protection of life or property." *Commonwealth* v. *Allen*, 54 Mass. App. Ct. 719, 720-721 and n. 1 (2002). The defendant was convicted of obtaining cable television service by fraud.

The Appeals Court reversed the order denying suppression: the circumstances "d[id] not support a conclusion that [the disabled man] was in a life-threatening situation requiring an immediate, warrantless entry and assistance." *Id.* at 721. The initial observation of the television set which was in plain view after the entry was not admissible. Further, said the Court, the defendant's subsequent consent to speak with the officer was tainted by the prior illegality: "nothing was offered by the government to negate the inference that the defendant's consent was obtained entirely through exploitation of the prior illegality." *Id.* Because there was additional evidence offered at trial that the EXTERNAL cable connections leading to the defendant's apartment had been altered, the Commonwealth was free to proceed with a retrial. *Id.* at 722.

SEARCH AND SEIZURE: MIRANDA WARNINGS' ABSENCE LEADS TO SUPPRESSION OF DRUGS OBTAINED AS RESULT OF DEFENDANT'S STATEMENT

Police were investigating a report that the defendant was intoxicated and had threatened to return to a business customer's home with a shotgun. They arrived at the defendant's warehouse office and smelled a strong odor of marijuana. After arresting and handcuffing him, they asked where the marijuana was, and he told them it was in his desk drawer. It was seized. The Appeals Court (52 Mass. App. Ct. 746 [2001]) had ordered suppression on the ground that the search of the drawer could not be justified as a search incident to arrest, given the strictures of G.L. c. 276, §1. On further appellate review, the SJC also ordered suppression, but on a different ground: the defendant was in custody, but was not given Miranda warnings before being asked about the marijuana. The Court held that not only the defendant's statement, but the marijuana as well, was a "fruit" of the Miranda violation. The Court rejected the argument of "inevitable" discovery, since no evidence was offered that the desk or any other part of the office would have been searched incident to the arrest had the statement not been made. *Commonwealth* v. *Dimarzio*, 436 Mass. 1012 (2002).

SEARCH AND SEIZURE: REASONABLE SUSPICION, ANONYMOUS TELEPHONE TIP

An anonymous telephone caller prompted the Holyoke police dispatcher to radio a bulletin "Disturbance on the third floor, 370 High Street. Someone hitting someone." Within one minute of this dispatch, three officers arrived at the address and saw two men hurriedly leaving the building. One of these men had a swollen face with puffy lips and eyes, looking as if he had been in a recent fight. The officers told the two to "hold on," and directed them back inside the building. All began walking up the stairs. During this walk, the defendant attempted to hide a knife; both the defendant and his brother were observed to have blood stains on their clothing. *Commonwealth* v. *Montanez*, 55 Mass. App. Ct. 132 (2002).

The Appeals Court held that, though anonymous, the tipster's information contained "measurable qualifying indicia of reliability," and demonstrating first-hand knowledge. The

order for the men to return to the inside of the building was held reasonable in the circumstances. *Id.* at 140-141.

SEARCH AND SEIZURE: STOP: REASONABLENESS OF OFFICER'S BELIEF HE IS IN DANGER

In *Commonwealth v. Stampley*, 437 Mass. 323 (2002), the SJC reversed the allowance of a motion to suppress which had been affirmed by the Appeals Court. The SJC ventured into the metaphysical in trying to establish the absolute minimal activity necessary to justify the police in ordering a passenger out of a car. In *Commonwealth v. Torres*, 433 Mass. 669 (2001), the SJC held that a passenger may only be ordered out of a vehicle if the officer has a reasonable belief that his safety or the safety of others is in danger. In related cases, the Court has emphasized that this is a low threshold. How low? In *Stampley,* the defendant, who did not have a seatbelt on and thus was about to be cited for a violation of a civil regulation, had his hand out of the window and put it back in the car and leaned forward two times. Presumably this occurred over the course of five or ten minutes while he was waiting by the side of the road. The court, in a footnote, spoke approvingly of cases upholding exit orders when a car's occupants have done nothing more than bend forward once or reach in some direction. This holding is limited however to that situation where the stop is still ongoing. The defendant had not yet received his notice of a civil infraction from the officer. Presumably, once he had received the citation he would have been free to leave. Cf. *Commonwealth v. Ferrara*, 376 Mass. 502 (1978)(exit order unlawful once valid license and registration produced, because there was no need for further protective precautions once purpose of stop accomplished.)

SEARCH AND SEIZURE: WARRANT; PROBABLE CAUSE FOR 'NO KNOCK' PROVISION

In *Commonwealth v. West*, 55 Mass. App. Ct. 467 (2002), the Appeals Court reversed the allowance of a motion to suppress, holding that the affidavit in support of the warrant did supply probable cause to justify dispensing with the common law requirement that police knock and announce their presence before executing a search warrant. The court did accept the SJC's holding in *Commonwealth v. Macias*, 429 Mass. 698, that the mere fact that drugs are involved and they are readily disposable is not enough to justify dispensing with the "no-knock" requirement. In this case, however, there were sufficient additional grounds contained in the affidavit, which when examined together, amounted to probable cause to believe that the evidence would be destroyed absent a no knock warrant. These included the presence of a dog usually tied up in the yard, the position of the apartment at a corner thereby giving occupants a commanding view of the arrival of any search team, the suspected involvement of a neighbor in an adjacent apartment, thereby providing the targets of the warrant with an additional aide who could alert them to police presence, and finally, the vast experience of the officer who included his opinion that these facts made dispensing with a knock and announce provision essential to the success of the search. This was enough for the Appeals Court, which remanded the case back for trial.

SEARCH AND SEIZURE: WRONGFUL STOP: INTERVENING ACT OF DEFENDANT RESULTING IN DISCOVERY OF CONTRABAND

Police pulled over a lawfully registered automobile as it traveled on a public way. The car belonged to the defendant's wife, but a friend of the defendant was driving it. The defendant

himself was in the passenger's seat when it was stopped. At the time of the stop the police had suspected that the car was involved in a shooting two to three weeks before. The driver was ultimately taken into custody when police determined that his license to operate was suspended. The defendant was permitted to contact his wife to come and pick up the car. Before she got to the scene the defendant re-entered the car and an officer still at the scene saw him holding a firearm in his lap. Although the motion judge found that the initial stop of the car was unlawful, he also found that the stop had ended, that the defendant was free to go, and that he and his wife had been permitted to leave with the car. The Court thus upheld the seizure of the weapon as the result of a wholly voluntary, intervening act of the defendant in returning to the car and taking hold of the firearm.
Commonwealth v. Maldonado, 55 Mass. App. Ct. 450 (2002).

SELF-INCRIMINATION, PRIVILEGE AGAINST; JUDGMENT OF 'CONTEMPT' REVERSED

A witness summoned to testify before a grand jury investigating charges of larceny from and arson of a store refused to answer questions, invoking her privilege against self-incrimination. The assistant district attorney then pursued a judgment of contempt against this witness, asserting to a Superior Court judge that the witness was not the target of the investigation, that she would only be asked to testify to information contained in the report of her interview by police, and that the target of the investigation was instead the assistant manager of the store at which the only other working employee at the time of the fire was the witness. In finding that the witness could not properly invoke her privilege against self-incrimination, the judge apparently accepted the prosecutor's representations and the inference that the Commonwealth had settled upon prosecuting the other possible party rather than the witness. *In the Matter of Proceedings Before a Grand Jury*, 55 Mass. App. Ct. 17 (2002).

The Appeals Court reversed the judgment of contempt, holding that the witness legitimately invoked her privilege. "[I]t was reasonable for the witness to fear that her proposed grand jury testimony might tend to incriminate her because of her proximity to the crime and the potential for her to be implicated as an alternative perpetrator or as a joint venturer or accessory." *Id.* at 21. It was not dispositive of the issue that the witness claimed innocence and the Commonwealth represented to the Court that she was not a target. The assistant manager had given inconsistent versions of events to police, and the last version had sought to paint the witness as the perpetrator of the crimes.

SENTENCING: JUDICIAL MISCONDUCT NOT FOUND IN JUDGE'S IMPLICIT SENTENCING BEFORE THE DISPOSITIONAL PRESENTATION OF COUNSEL

In *Commonwealth* v. *Lord,* 55 Mass. App. Ct. 265 (2002), whose facts are summarized at ***CRIMES: ASSAULT AND BATTERY BY MEANS OF DANGEROUS WEAPON; CHEMICAL MACE AS DANGEROUS WEAPON (PER SE)***, the trial judge prepared, BEFORE THE SENTENCING HEARING, a sentencing memorandum explaining her reasons for departing from the penalty range suggested by the sentencing guidelines. The Appeals Court brushed aside the defendant's complaint that her obvious pre-judging on the matter deprived him of his right to any meaningful sentencing hearing. According to the Court, the preparation of the memorandum did not "commit [her] to a particular sentencing decision," even though the memorandum had already set forth aggravating factors "that caused her to impose the maximum sentences permitted by the relevant statutes." *Id.* at 273. Isn't it stunning that the Court

"discern[ed] no indication of prejudging," *id.* at 274, in these circumstances? The opinion seemed to find some relevance in the stated fact that the defendant presented no "evidence" at the hearing, but "merely argued for the adoption of the sentences indicated by the guidelines," *id.*, though why this was so is unknown.

SENTENCING: RESTITUTION; DAMAGES SUSTAINED DURING THE CRIMINAL EPISODE

The Commonwealth's evidence was that the defendant set upon a man who was foraging for returnable cans in dumpsters on the premises of an apartment complex. During the first attack, the defendant allegedly knifed the victim in the upper buttocks. The victim nonetheless proceeded to a second dumpster, but the defendant returned, this time with his dog, which was ordered to attack the victim. The victim fled to his car; as he got into the car, the defendant kicked the door and the fender. About five hours later, when contacted by police, the defendant acknowledged that he had kicked the victim during an altercation prompted by the victim's "trespassing on his property." Though the defendant denied having stabbed the victim, a jury found him guilty of assault and battery by means of a dangerous weapon. The prosecution had additionally charged the defendant with armed robbery, allegedly of the bag of cans; this charge was reduced to larceny from the person for trial, but after the Commonwealth rested, the judged entered a required finding of not guilty on this latter charge. *Commonwealth* v. *McIntyre*, 436 Mass. 829 (2002).

One condition of probation imposed upon the defendant was payment of restitution. Following a hearing, the judge allowed restitution for damage to the victim's car ($168 in receipts for the cost of repairs to the fender and door having been proffered), but denied the victim's claim for the collected cans (as to which a required "not guilty" finding had been entered). The defendant argued that there could be no order for payments for the car repairs because there had been no conviction, or even charge, of malicious destruction of property. While the SJC agreed that restitution "must bear a causal connection to the defendant's crime," it would "look to the underlying facts of the charged offense, not the name of the crime of which the defendant was convicted [.]" *Id.* at 835. Because "[t]here is no question that the damage to the victim's car occurred during the course of an ongoing assault [,]" *id.* at 836, the restitution order was affirmed.

SENTENCING: STANDING OF VICTIM

The victim in the case of *Commonwealth v. Hagen*, 437 Mass. 374 (2002), had filed a motion in a case seeking to revoke the stay of execution of the defendant's sentence pending his appeal. She had filed the motion pursuant to the recently enacted 'victim's bill of rights', codified in § 3 (f) of G.L. c. 258B. The motion was denied and she petitioned for relief pursuant to c. 211, § 3. A single justice upheld the denial ruling that the victim was not a party to the proceeding and had no judicially cognizable interest in the prosecution of another. The full Court affirmed this ruling. The Court nonetheless asserted that the victim should have the opportunity to address the court when her right to a prompt disposition of the case is jeopardized. Justice Cowin concurred in the result, but noted that the victim's rights bill did not give standing to anyone who is not a party to a suit to participate in its proceedings.

SEXUALLY DANGEROUS PERSON: DEFENDANT CURRENTLY INCARCERATED ON NON-SEX OFFENSE

One by one, the big questions are answered. In *Commonwealth v. McLeod*, 437 Mass. 286 (2002), the SJC held that the new sexually dangerous person commitment statute was not applicable to persons unless they are currently being incarcerated for non-sex offenses. In *McLeod*, the defendant did have an old conviction for rape on his record, but had been released after serving his sentence before the enactment of the new "sexually dangerous person" statute. In early 2000, about a year after the new law went into effect, the defendant was sentenced to the house of correction for a three month term for an assault and battery and related lesser offenses. While incarcerated at the House, the Commonwealth petitioned for his civil commitment as a sexually dangerous person, based on his prior (eight-year-old) conviction for rape. This case had significant ramifications. At stake was expansion of the statute to reach all persons who had ever been convicted of an enumerated sexual offense, no matter how long before, who were currently incarcerated for any reason. In its holding the SJC limited the Commonwealth's power to petition for civil commitment to only those persons currently incarcerated for a sexual offense.

SEXUALLY DANGEROUS PERSONS: DUE PROCESS REQUIREMENTS FOR COMMITMENT

The petitioner, after numerous convictions for indecent assault and battery on a child, was adjudicated a sexually dangerous person in 1988, and completed all underlying criminal sentences in 1997. A judge considering a petition filed in 1996 pursuant to G.L. c. 123A, §9, determined that the petitioner remained "sexually dangerous." The case came before the SJC on appeal from the denial of a "petition for habeas corpus" filed in 1998. The Court believed his argument to be a challenge to his original commitment in 1988 on the ground that the sexually dangerous persons statutes as they then existed violated the federal constitutional guarantee of substantive due process. Specifically, he argued that Kansas v. Crane, 122 S. Ct. 867 (2002), and its predecessor, Kansas v. Hendricks, 521 U.S. 346 (1997), require the State to establish, for forcible civil detainment, that the person to be "detained" is unable to control his behavior and thereby poses a danger to the public; a finding of dangerousness alone is insufficient. The statute under review in Hendricks was saved because it limited civil commitment to those with a mental abnormality causing "volitional impairment rendering them dangerous beyond their control." While the State need not always prove that a dangerous individual is completely unable to control his behavior, "a showing of serious difficulty in controlling behavior is required." *Dutil, petitioner,* 437 Mass. 9, 14 (2002). Dutil argued that chapter 123A did not, in 1988, require proof of lack of control, but instead allowed that inference merely from repetitive conduct. The Court failed to actually meet that argument, asserting only that civil commitment was, neither then nor thereafter, "permitted based solely on an individual's past sexual conduct," but instead required proof of present dangerousness. The inquiry was to focus on "the individual's likelihood of causing harm in the future due to his mental condition." *Id.* at 15-16.

Dutil argued as well that the Massachusetts statute was impermissibly overinclusive, allowing civil commitment not only of those who had "uncontrollable" desires, but of those who had "uncontrolled" desires, i.e., imprisoning for life not only those with a mental abnormality but those who chose to engage in inappropriate sexual conduct despite their ability to control their desires. This was called "a specious argument." *Id.* at 17. "A mental condition may create serious difficulty in controlling behavior even though the individual's desires are not completely 'uncontrollable.'" *Id.* at 18. The Supreme Court in Crane was said to have "refused to restrict Hendricks to volitional impairments, and suggested that an individual may be adjudged sexually dangerous if the difficulty in controlling behavior is caused by an emotional or cognitive

condition. ... As long as the statute requires a showing that the prohibited behavior is the result of a mental condition that causes a serious difficulty in controlling behavior, the statute meets due process requirements." *Id.*

SEXUALLY DANGEROUS PERSON: EVIDENCE; POLICE REPORTS OF NOLLE PROSSED CASES

In *Commonwealth v. Markvart*, 437 Mass. 331 (2002), the SJC answered several questions that were reported to it by a Superior Court Judge in Hampden County. The first question was whether qualified examiners could get police reports in cases where a nolle prosequi was filed. The answer is yes. The defendant had argued that the statute did not specifically authorize prosecutors to supply such records to the examiners. Although true, the Court reasoned that the statute did not forbid the practice either. That being so, the prosecutor was permitted to supply such reports to the QE. The next question was whether the reports from such cases could be admitted into evidence at the trial. The answer to this question was no, with a caveat. The QE may base his or her opinion regarding the defendant's sexual dangerousness on the reports from the nolle prossed case as long as the facts and data contained in the report are independently admissible at trial. The particular facts contained in the police reports, however, cannot be elicited on direct examination. To the extent that the facts from the police reports in any cases that were nolle prossed are in the QE's report, they must be redacted before the report is submitted to the jury.

SPEEDY TRIAL: DELAY FOR DEFENDANT'S BENEFIT

In Commonwealth v. Vasquez, 55 Mass. App. Ct. 523 (2002), the defendant's motion to dismiss on Rule 36 grounds was denied. The delay at issue was over 1,100 days. This case serves as a refresher course in ways to exclude time periods under Rule 36. Although none of the delays was excludable under the plain language of the rule, the Court also noted that delay may be excused by showing that the defendant acquiesced in, was responsible for, or benefited from the delay (citing *Barry v. Commonwealth*, 390 Mass. 285 (1983)). In this case the vast bulk of the delay was caused by DSS's lethargic response to a request for records ordered by the Court. Where the records were for the benefit of the defendant, and DSS was not under the control of the prosecution, the court excluded the period of delay attributable to DSS's production of records. The 'benefit' inuring to the defendant by virtue of the production of the records also undermined the defendant's Sixth Amendment speedy trial claim.

SPEEDY TRIAL: RULE 36 IS NOT A <u>COMPLETE</u> NULLITY!

The defendant was arraigned on January 15, 1998, on a charge of assault and battery by means of a dangerous weapon (date of alleged offense being August 13, 1997). He was serving a sentence for a different crime as the ABDW charge languished on the docket of the trial court for some 812 days before trial occurred. As has been apparent to all, the courts have imposed upon the defendt the burden of getting the case to trial: he "may not passively watch the clock tick off a year and claim the benefit of the rule." *Commonwealth* v. *Murphy*, 55 Mass. App. Ct. 332 (2002). Furthermore, if he wants the benefit of anything like, say, pretrial discovery, or resolution of a claim that his rights against unreasonable search and seizure have been violated, whatever time it takes to accomplish those goals is *excluded* from the "year" time envisioned by M.R.Crim.P. 36 to be the maximum length of time before trial.

But, wonder of wonders, an appellate court has actually ordered dismissal under Rule 36!

After defense motions for discovery, and motions for continuances either made or "acquiesced in" by defense counsel, 268 days elapsed. Thereafter, between November 19, 1998 and December 23, 1999, the case "slumbered on a Superior Court trial list in Plymouth County[.]" Pro se motions filed by the defendant, for dismissal of the charge pursuant to Rule 36 and for appointment of new counsel (because the case was not being moved with present counsel), "stirred the case from its dormant state." *Id.* at 334. Defense counsel himself moved for a "speedy" trial on March 20, 2000. Only three more weeks elapsed before the case came on for trial, on April 7, 2000. Before jury selection, counsel pressed for dismissal, asserting that he had spoken to the prosecutor and the clerk a number of times about a date for trial, trying to get some action on it, each time telling them he "was always ready for this case." When asked for "his take on what had happened," the prosecutor acknowledged that "it's not much different from [defense counsel's] take on what happened," and that the case "has sat on this list for a long, long time. Why our number hasn't been called sooner, I don't know. I can tell the Court I've discussed the case, as [defense counsel] has, with the clerks." *Id.* at 335

Rule 36 and G.L. c.278, §1 establish burdens ON THE PROSECUTOR, who has ultimate responsibility for the timely trial of cases. "That burden is not on the defendant." *Id.* at 336. While "[i]t would surely have been better if defense counsel had filed a written motion for a speedy trial," *id.* at 335, "if rule 36 were held never to begin to run until the defendant first makes an objection, the balance of obligations envisioned by the rule would be upset." *Id.* The period from November 20, 1998, to April 7, 2000 was more than 365 days: dismissal was ordered.

TRIAL PRACTICE: DEFENDANT GOES MISSING AFTER RECESS: PROCEDURE

In *Commonwealth v. Carey*, 55 Mass. App. Ct. 908 (2002), the defendant never came back from lunch. The judge waited half an hour and recommenced the trial. The judge made no effort to determine the reason for the defendant's disappearance. This was error. In these circumstances, the judge should hold a voir dire hearing to determine whether the defendant's absence was without cause. The judge should follow this procedure even where, as in this case, he also instructs the jury to ignore the fact that the defendant is missing and draw no inference from it. Here, because the instruction was given, the defendant's absence was not exploited in any fashion by the prosecutor, and there was no evidence that the absence was justified, the Court found the error to be harmless.

TRIAL PRACTICE: STIPULATIONS

In cases where the only real issue is a motion to suppress or dismiss, or some other evidentiary issue, it is not uncommon for trial counsel, after losing the motion, to stipulate to the "facts," accept the finding of guilt and then pursue the denial of the motion at the appellate level. Extraordinary care must be taken in this circumstance to avoid waiving the very appellate issue that counsel is planning on pursuing. *Commonwealth v. Brown*, 55 Mass. App. Ct. 440 (2002), discussed earlier in EVIDENCE: SUFFICIENCY, reminds us that stipulating to facts conclusive of guilt is tantamount to a guilty plea. A full colloquy must be conducted to ensure the waiver of rights to confront and cross-examine witnesses, and the right against self-incrimination are intelligently waived. If such a stipulation is envisioned, counsel should be careful to narrowly limit the stipulation to the fact that particular "evidence" would be forthcoming, and should be sure to include on the record that the stipulation is not intended to waive any motion which has already been ruled on in the case and which will be the subject of appeal. When one stipulates

instead to "the facts," one is stipulating to the "truth" of the proffered evidence.

YOUTHFUL OFFENDER: NOT FOR 'ASSAULT & BATTERY' CHARGE, AND NOT FOR LESSER-INCLUDED 'ASSAULT & BATTERY' CONVICTION ON INDICTMENT CHARGING A&B BY MEANS OF DANGEROUS WEAPON

A juvenile was proceeded against by indictments on charges of assault and battery and assault and battery by means of a dangerous weapon, arising out of a fight in which, the alleged victim claimed, he was punched and kicked and thrashed with a belt with a metal buckle. The juvenile's motion for required finding of not guilty or "not youthful offender" at the close of the Commonwealth's case should have been allowed on the charge of assault and battery. "Youthful offender" status may not be predicated on a charge of mere assault and battery, because that crime is not one which, if the accused were an adult, would be punishable by imprisonment in the state prison. See G.L. c. 119, §54. Similarly, when the jury's verdict on the ABDW indictment was a finding that the juvenile had committed only assault and battery, a "youthful offender" judgment could not be sustained. *Commonwealth* v. *Lamont L.*, 54 Mass. App. Ct. 748, 754-755 (2002). The matter was remanded to the Juvenile Court for entry instead of a delinquency adjudication by reason of assault and battery, with appropriate re-sentencing.